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# An Emerging Uniformity for International Law

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*Abstract*

*The status of international law in the U.S. legal system has been hotly contested. Most international law scholars maintain that customary international law ("CIL") is federal common law immediately applicable in federal courts. A minority of scholars has responded that CIL may be applied by federal courts only when authorized by the political branches. The Supreme Court's decision in* Sosa v. Alvarez-Machain, *542 U.S. 692 (2004), stoked the debate. In* Sosa*'s wake, scholars have overwhelmingly concluded that the Supreme Court endorsed the majority view that CIL is federal common law.*

*This Article asserts that* Sosa *has been both misperceived and underappreciated.* Sosa *not only supports the minority position that federal judicial authority to incorporate CIL hinges on congressional intent, but* Sosa *also suggests that federal incorporation is governed by the same considerations that determine whether treaties are self-executing and immediately applicable in U.S. courts: namely, the intent of the political branches, specific definition, mutuality, practical consequences, foreign relations effects, and alternative means of enforcement.* Sosa *thus manifests the emergence of a uniform doctrine that governs the federal status of both treaties and CIL. This emerging doctrine, which serves to police the distribution of lawmaking and foreign affairs authority between the judiciary and the political branches, has significant implications. It suggests that the reigning confusion over the domestic status of international law is being replaced with doctrinal clarity and coherence, reveals that the collective wisdom on the domestic status of international law is out of step with Supreme Court jurisprudence, results in more appropriate treatment of CIL relative to treaties, and indicates that efforts to incorporate international law as federal law should focus on the political branches, not the courts.*

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## *Introduction*

The status of international law in the U.S. legal system has long been murky.[1] Debate over the issue has reached a feverish pitch in recent years.[2] Scholars have clashed over such issues as whether customary international law ("CIL")[3] is federal or state law and whether CIL may be applied by federal courts absent incorporating legislation.[4]

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1 *See* Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest:* Sosa v. Alvarez-Machain *and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2243 (2004) (referring to the "decades-old battles over the constitutional status of international law"); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 367–68 (2002) (noting that the debate over the domestic status of customary international law was precipitated by the Supreme Court's 1938 decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), as well as increases in both the scope of international law and litigation based on it in the latter 1900s). *See generally* Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1985); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988); Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295; A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995).

2 *See* Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 153–54; Young, *supra* note 1, at 366.

3 CIL is traditionally defined as the "general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); *see also* Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060 [hereinafter Statute of the International Court of Justice], *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm (identifying "general [state] practice accepted as law" as a source of international law).

4 *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) [hereinafter Bradley & Goldsmith, *CIL as Federal Common Law*] (arguing that CIL is not federal common law and must be incorporated by the political branches before it may be applied as a

Recently, in *Sosa v. Alvarez-Machain*,[5] the Supreme Court stepped into the debate, commenting on the meaning of the Alien Tort Statute ("ATS"),[6] a Founding-era jurisdictional statute that has been used to bring suits based on CIL in federal courts.[7] The Court concluded that federal courts may recognize certain common-law causes of action based on CIL under the ATS.[8] In the wake of this decision, scholars have begun to discuss *Sosa*'s import for the status of CIL in federal courts.[9] However, many have failed to recognize what *Sosa* suggests about the status of international law in federal courts more generally.

CIL is one of two primary sources of international law; treaties constitute the other.[10] In *Sosa*, the Supreme Court—without acknowledging it, and perhaps unknowingly—started to close a circle the Court began to draw nearly two hundred years ago when it adopted

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rule of decision by federal courts); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (defending the traditional position that CIL is federal law subject to common-law incorporation by federal courts); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) (replying to Professor Koh); Curtis A. Bradley, *The Status of Customary International Law in U.S. Courts—Before and After* Erie, 26 DENV. J. INT'L L. & POL'Y 807 (1998); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997); Ryan Goodman & Derek P. Jinks, Filartiga*'s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393 (1997); Young, *supra* note 1.

5 Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). The facts of *Sosa* are discussed in conjunction with this Article's analysis of *Sosa*'s reasoning. *See infra* Part III.

6 Alien Tort Statute, 28 U.S.C. § 1350 (2000). The ATS currently provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.*

7 While the ATS had largely gone unnoticed since its inclusion in the original Judiciary Act of 1789, the Second Circuit's 1980 decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), brought the ATS out of obscurity and opened the door for federal courts to hear suits by aliens based on violations of CIL. A variety of such suits were brought following *Filartiga*. *See, e.g.*, Doe v. Unocal, 395 F.3d 932 (9th Cir. 2002), *vacated and reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *and district court opinion vacated en banc*, 403 F.3d 708 (9th Cir. 2005); Bigio v. Coca-Cola Co., 239 F.3d 440 (2d Cir. 2000); Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Hamid v. Price Waterhouse, 51 F.3d 1411 (9th Cir. 1995); *In re* Estate of Marcos, Human Rights Litig., 25 F.3d 1467 (9th Cir. 1994).

8 *Sosa*, 542 U.S. at 724–25.

9 *See infra* Part I.

10 *See* Statute of the International Court of Justice, *supra* note 3, at art. 38; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

the self-execution doctrine for treaties.[11] In *Sosa*, the Court suggested that questions as to whether treaties and CIL may be applied as rules of decision by federal courts are governed by the same doctrine. This Article identifies the emergence of this doctrine and discusses its implications.

Part I provides context for this discussion by briefly recounting the debate regarding the domestic status of international law both prior to and following *Sosa*. As this Part reveals, the academic discussion of *Sosa* has failed to recognize the apparent emergence of a uniform approach to the federal status of treaties and CIL. Part II provides the backdrop for perceiving this emerging doctrine by outlining the analysis courts employ to determine whether treaties may be invoked as rules of decision in U.S. courts. Against this background, Part III analyzes the Court's opinion in *Sosa*, identifying the test the Supreme Court developed for determining when CIL may be applied as federal law in federal courts. Part IV renders explicit what Parts II and III suggest: that the same doctrine that governs the status of treaties also governs the status of CIL in federal courts. Part IV identifies the substance of this doctrine and provides a brief discussion of its implications, opening the door for scholarly debate on this emerging, and surely controversial, doctrine.

## *I. Debate over the Status of International Law in Federal Courts*

As noted, the status of international law in the U.S. legal system has long been contested. The debate has been somewhat less feverish with regard to treaties than with CIL. The question of whether treaties may be applied in U.S. courts as federal law has, at some level, been addressed by the Constitution and the self-execution doctrine.[12] Scholars have criticized the concept of non-self-execution, however, arguing that it is inconsistent with treaties' status as supreme federal

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11 *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1828), *overruled in part by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

12 *See infra* Part II. This is not to suggest that the doctrine itself is clear, *see* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 695 (1995) (noting that the distinction between self-executing and non-self-executing treaties "is a matter of some controversy and much confusion"), but that the doctrine governs the questions of whether and when treaties may be applied by U.S. courts as federal law. If a treaty is found to be self-executing, then it is immediately applicable by U.S. courts, whereas a non-self-executing treaty requires implementing legislation before plaintiffs may enforce the substance of its terms. *See infra* note 35 and accompanying text.

law, and they have challenged the political branches' practice of attaching non-self-execution declarations to the ratification of treaties.[13] A minority of scholars has sought to defend non-self-execution.[14]

By contrast, the status of CIL in federal courts has remained uncertain as a matter of doctrine.[15] Broad references by the Supreme Court to international law's domestic status have failed to supply clear guidance,[16] and lower courts have treated CIL as federal common law

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13 *See, e.g.*, Malvina Halberstam, Alvarez-Machain II: *The Supreme Court's Reliance on the Non-Self-Executing Declaration in the Senate Resolution Giving Advice and Consent to the International Covenant on Civil and Political Rights*, 1 J. NAT'L SECURITY L. & POL'Y 89, 92, 95–107, 110–11 (2005) (disputing, even after *Sosa*, the constitutionality of non-self-execution declarations attached to otherwise self-executing treaties); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 760 (1988) (asserting that the self-execution doctrine "is a judicially invented notion that is patently inconsistent with" the Supremacy Clause); David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 6–7, 14–16, 45–73 (2002) (challenging the Restatement's position on self-execution as inconsistent with the Constitution); Carlos M. Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2156–58, 2169–88, 2191–92, 2214 (1999) (arguing that both a broad concept of non-self-execution and non-self-execution declarations are inconsistent with the Supremacy Clause, while nonetheless accepting the validity of non-self-execution declarations); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1959–60, 1979–81, 1983 (1999) (summarizing the position of the self-execution doctrine's critics).

14 *See* Yoo, *supra* note 13; John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999). For responses to Professor Yoo's position, see Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1995); Vázquez, *supra* note 13.

15 *But cf.* Koh, *supra* note 4, at 1824–27, 1830–41 (arguing that federal courts' incorporation of CIL as federal common law has been the established practice at least since the U.S. founding).

16 See, for example, the famous statement in *The Paquete Habana*, 175 U.S. 677 (1900), that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *Id.* at 700. For divergent views on the import of *The Paquete Habana*, see Ku & Yoo, *supra* note 2, at 172–73 (arguing that "if anything, [*The Paquete Habana*] undermine[s] the idea that federal courts have power to enforce CIL as federal law"); Young, *supra* note 1, at 451 (noting, *inter alia*, that international law was part of general common law when *The Paquete Habana* was decided); Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469, 519 (2004) (same); Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note 4, at 849–50 (same); JOHN M. ROGERS, INTERNATIONAL LAW AND UNITED STATES LAW 135–39 (1999) ("[I]nternational law is part of our law . . . in the same way that 'justice' or 'fairness' or 'sound policy' is a part of our law. . . . [I]t forms the basis for decision when no other dispositive source controls."); Koh, *supra* note 4, at 1830–41 (citing *The Paquete Habana* to support the contention that "[b]oth before and after *Erie*, the federal courts issued rulings construing the law of nations"). *See also* Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 YALE L.J. 855, 858–60, 865–66 (2005) (noting selective scholarly reliance on prior cases to support divergent views of the courts' role in foreign affairs).

for some purposes but not others.[17] Scholars have likewise split on the issue.

Prior to *Sosa*, the prevailing view was that CIL was applicable in federal courts as federal common law without a need for incorporation by the political branches.[18] Professor Koh, for example, argued that "[o]nce customary norms have sufficiently crystallized, courts should presumptively incorporate them into federal common law, unless the norms have been ousted as law for the United States by contrary federal directives."[19] This view was challenged by a minority of scholars who claimed that CIL should not qualify as federal common law post-*Erie*,[20] and thus could not provide a federal[21] rule of decision absent incorporation by the political branches.[22] The crux of the minority position was that the political branches must take the lead in rendering CIL domestic law. While other views were advanced,[23]

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17 "Although the lower federal courts have endorsed the [majority] position, they have done so mostly in jurisdictional contexts and have not generally considered its broader substantive implications"; for example, courts generally have not found that CIL binds the President, nor have they held that CIL is supreme over state law. Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note 4, at 821, 845 & n.199, 851, 873; *see also* Young, *supra* note 1, at 379, 381–84 (explaining that although some courts have endorsed the view that CIL is federal common law for purposes of arising-under jurisdiction, generally courts have not adopted the view that CIL trumps inconsistent state law as federal common law would).

18 Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note 4, at 816–17, 820; Koh, *supra* note 4, at 1824–26, 1835 & n.61, 1841; Young, *supra* note 1, at 375. CIL as common law would trump state law and create arising-under jurisdiction. *See, e.g.*, *id.* at 377–78.

19 Koh, *supra* note 4, at 1835.

20 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

21 State incorporation of CIL would provide a state rule of decision for federal courts sitting in diversity. *See* Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note 4, at 870.

22 *See id.* at 817, 870; Koh, *supra* note 4, at 1840 n.84; Young, *supra* note 1, at 369, 463–64 & n.505.

23 *See* T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91, 97 (2004) (advancing a view of CIL "as *nonpreemptive, nonfederal law* . . . . to which federal courts would look when seized of jurisdiction and considering a case in which international law norms might be applied"); Michael D. Ramsey, *International Law as Non-preemptive Federal Law*, 42 VA. J. INT'L L. 555, 558 (2002) ("suggest[ing] that international law be treated as *non-preemptive* federal law"); ROGERS, *supra* note 16, at 139–68 (arguing that federal courts may apply CIL to preempt state-law violations of international law where (a) there is no federal statute authorizing the violation, (b) the federal government would have power to legislate that the state comply with international law, and (c) the executive agrees, and the court confirms, that the relevant norm of CIL binds the United States); Young, *supra* note 1, at 370–71, 467–68 (advocating a return to CIL's pre-*Erie* status as general law that would make CIL available to both federal and state courts pursuant to conflict-of-law principles); Young, *supra* note 16, at 507–09 (same); *id.* at 471, 517 (arguing that foreign affairs law ought to be normalized, i.e., that we should "[a]ccept broad legislative authority [in the area of foreign affairs], but insist that federal [foreign affairs]

these two framed the discussion. Each raised persuasive arguments;[24] neither was the clear winner.[25]

*Sosa* provided additional fodder for the debate between the two positions. In *Sosa*'s wake, commentators have tended to conclude that the Supreme Court vindicated the majority position that federal courts possess the authority to incorporate CIL as federal common law even in the absence of congressional authorization.[26]

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law be made according to constitutionally prescribed processes," not through exceptional incorporation of CIL as federal common law).

24 See Young, *supra* note 1, for one commentator's assessment of the strengths and weaknesses of each position. Young concludes, *inter alia*, that the majority position is inconsistent with *Erie*, but that the minority view leaves too little room for the application of CIL in federal courts. *See id.* at 372, 410–14, 462, 464–67, 510–11.

25 *See* Ku & Yoo, *supra* note 2, at 154 (noting that "neither side has convinced the other" and that "formalist arguments over the interpretation of the ATS" had reached a stalemate prior to *Sosa*).

26 *See* Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 L. & CONTEMP. PROBS. 169, 173 (2004) (arguing that *Sosa*'s "import is to confirm that international custom was part of judicially enforceable federal law even in the absence of a statute"); Harold Hongju Koh, *The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1, 12–13 (2004) (observing that all circuit courts, and now the *Sosa* Court, have rejected the minority position, though *Sosa* only recognized "a federal common law, civil remedy for a very limited class of gross human rights violations"); Ku & Yoo, *supra* note 2, at 170, 199, 204, 206, 219 (noting that *Sosa* endorsed the majority position on the federal courts' authority to apply CIL); *see also* Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT'L L. 273, 285–86 (2006); William S. Dodge, *Bridging* Erie*: Customary International Law in the U.S. Legal System After* Sosa v. Alvarez-Machain, 12 TULSA J. COMP. & INT'L L. 87, 88, 95, 100 (2004); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 104 n.27, 182 n.438 (2004); Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111, 118–19; Leila Nadya Sadat, *An American Vision for Global Justice: Taking the Rule of (International) Law Seriously*, 4 WASH. U. GLOBAL STUD. L. REV. 329, 342 (2005); Steinhardt, *supra* note 1, at 2251, 2253–55, 2259, 2272; Beth Stephens, *Corporate Liability Before and After* Sosa v. Alvarez-Machain, 56 RUTGERS L. REV. 995, 1000 (2003) [hereinafter Stephens, *Corporate Liability*]; Beth Stephens, *"The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 547–50, 556 (2004–2005) [hereinafter Stephens, *Human Rights Litigation*]; Jon M. Van Dyke, *The Role of Customary International Law in Federal and State Court Litigation*, 26 U. HAW. L. REV. 361, 374 (2005); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1694 (2004); Ehren J. Brav, Recent Development, *Opening the Courtroom Doors to Non-Citizens: Cautiously Affirming* Filartiga *for the Alien Tort Statute*, 46 HARV. INT'L L.J. 265, 266, 273–78 (2005); *Leading Cases: Federal Statutes and Regulations*, 118 HARV. L. REV. 446, 451–53 (2004) [hereinafter *Leading Cases*]; Note, *The Offences Clause After* Sosa v. Alvarez-Machain, 118 HARV. L. REV. 2378, 2383–85 (2005); Recent Case, Igartúa-de la Rosa v. United States, 119 HARV. L. REV. 1622, 1627 (2006); *cf.* Julian G. Ku, *Structural Conflicts in the Interpretation of Customary International Law*, 45 SANTA CLARA L. REV. 857, 861–62 (2005) (noting that *Sosa*, though it appeared to assume that CIL was cognizable in federal courts, did not completely settle the debate over its status). *But cf.* Luisa Antoniolli, *Taking Legal Pluralism Seriously: The Alien Tort Claims Act and the Role of International Law Before U.S. Federal Courts*, 12 IND. J. GLOBAL LEGAL STUD. 651, 656, 658 (2005) (asserting that *Sosa* "established

*Sosa*'s significance, however, has been both misperceived and underappreciated. Far from endorsing the majority view of CIL, the Court nodded support for the minority position by demonstrating that the application of CIL in federal courts turns on congressional intent.[27] More significantly for current purposes, the Court took this position in the course of making a broader statement about the status of international law in federal courts; that is, the Court not only reaffirmed the self-execution doctrine with regard to treaties, but also indicated that the substance of that doctrine governs the application of CIL in federal courts.[28] The Court thus set a trajectory toward a uniform approach to the application of both sources of international law. To perceive this broader point in *Sosa*, one must understand in some detail the self-execution doctrine that courts use to determine whether treaties are immediately applicable as federal rules of decision. Part II discusses the necessary contours of that doctrine.

## *II. Treaties in U.S. Courts*

In contrast to CIL, treaties boast a prominent place in the Constitution. Not only does Article II allocate the authority to make treaties,[29] but the Supremacy Clause states that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall

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very strict criteria" for the application of CIL in federal courts and confined it "to areas where there is a congressional mandate"); Christiana Ochoa, *Access to U.S. Federal Courts as a Forum for Human Rights Disputes: Pluralism and the Alien Tort Claims Act*, 12 IND. J. GLOBAL LEGAL STUD. 631, 639, 648 (2005) (observing that *Sosa* only permits federal courts to apply CIL "in a very limited set of circumstances"); Eric A. Posner, *Transnational Legal Process and the Supreme Court's 2003–2004 Term: Some Skeptical Observations*, 12 TULSA J. COMP. & INT'L L. 23, 28 (2004) (remarking that *Sosa*'s true effect will not be known until interpreted by lower courts); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1528–29 (2004) (claiming that *Sosa* held that "Congress has assigned to the federal courts modest authority to reckon customary international law"); Young, *supra* note 16, at 521 (arguing that *Sosa* "*rejected* a notion that customary international law just *is* federal law").

Commentators have also lamented the number of questions regarding CIL's status that *Sosa* leaves unresolved. *See, e.g.*, Benjamin Berkowitz, Sosa v. Alvarez-Machain*:* *United States Courts as Forums for Human Rights Cases and the New Incorporation Debate*, 40 HARV. C.R.-C.L. L. REV. 289, 290 (2005); Ku & Yoo, *supra* note 2, at 176; *Leading Cases*, *supra*, at 446, 451, 454.

This Article takes issue with both assessments: that *Sosa* tends to support the majority position and that *Sosa* fails to provide significant guidance on the status of CIL in domestic law.

27 For a more thorough discussion of *Sosa*'s rejection of the majority position, see Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. (forthcoming 2007).

28 Thus, in substance, the Court rejected prior assertions that "the self-executing treaty doctrine does not apply to [CIL]." Paust, *supra* note 13, at 782.

29 U.S. CONST. art. II, § 2, cl. 2.

be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[30] On its face, the Supremacy Clause might suggest that treaties could and should be applied as U.S. law in U.S. courts whenever they are at issue. Since early in U.S. history, however, the enforcement of treaties in U.S. courts has been limited by the doctrine of self-execution.

In 1828, the Supreme Court in *Foster v. Neilson*[31] explained that while the "[C]onstitution declares a treaty to be the law of the land" and therefore equivalent in status to federal statutes, not all treaties may be applied by U.S. courts.[32] Some treaties resemble contracts by which states agree to undertake certain acts. The performance of these acts is entrusted "to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."[33] As a result, only treaties that are self-executing provide domestic rules of decision for U.S. courts; non-self-executing treaties, while still binding on the United States internationally,[34] require implementing legislation before their provisions may be judicially enforced.[35] When treaties are invoked as rules of decision, then, courts must determine whether they are self-executing.[36]

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30 *Id.* art. VI, cl. 2.

31 Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1828), *overruled in part by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

32 *Id.* at 314.

33 *Id.*; *see also* Whitney v. Robertson, 124 U.S. 190, 194 (1888).

34 *See, e.g.*, Head Money Cases, 112 U.S. 580, 598 (1884) (holding that a treaty "depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it," although it "may also contain provisions which confer certain rights . . . which are capable of [judicial] enforcement as between private parties in the courts of the country"); Diggs v. Richardson, 555 F.2d 848, 850–51 (D.C. Cir. 1976); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h, reporters' note 5 (1987); *id.* § 321 & cmt. a.

35 *Foster*, 27 U.S. (2 Pet.) at 314; *see also* Ogbudimkpa v. Ashcroft, 342 F.3d 207, 218 & n.22 (3d Cir. 2003). This is not to say that a treaty that does not provide a right of action may not be invoked defensively. *See* Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1143–44 (1992).

36 *But cf.* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 158–59, 183, 187 (1993) (obviating any need to address self-execution in concluding that the treaty invoked did not guarantee the right plaintiffs claimed); Maiorano v. Balt. & Ohio R.R. Co., 213 U.S. 268, 273–75 (1909) (same); United States v. Lee Yen Tai, 185 U.S. 213, 222–23 (1902) (avoiding any need to address self-execution by concluding that a treaty and statute did not conflict and therefore did not raise any question of the treaty's superseding effect); Amaya v. Stanolind Oil & Gas Co., 158 F.2d 554, 556 (5th Cir. 1947) (presuming that treaties are generally self-executing); Paust, *supra* note 13, at 772–73 & nn.83–90 (positing that two lines of Supreme Court cases exist with regard to self-execution: "one line . . . accepted the general distinction between self- and non-self-operative treaties, while the other . . . seems simply to have ignored it"); Vázquez, *supra* note 12, at 716 & n.99 (noting that while "the lower courts in recent years have treated [an expansive,

Courts do not always make this determination explicitly or even after significant analysis.[37] As a result, the content of self-execution analysis has not always been clear.[38] Nonetheless, the Supreme Court

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abstention-like version of] self-execution as a threshold issue to be addressed in every treaty case," the Supreme Court has resolved countless cases "without even mentioning the self-execution issue").

37 For example, courts have repeatedly found, without conducting an express self-execution analysis, that treaty provisions guaranteeing rights to aliens are enforceable. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporters' note 5 (1987) (citing cases from the 1700s, 1800s, and 1900s); *see Head Money Cases*, 112 U.S. at 598 (citing "treaties, which regulate the mutual rights of citizens or subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens" as examples of treaties that provide judicially enforceable rights). To illustrate, the Supreme Court in *Hauenstein v. Lynham*, 100 U.S. 483 (1879), concluded that an 1850 treaty between the United States and Switzerland allowed a Swiss heir to recover the value of U.S. real estate owned by a deceased Swiss citizen notwithstanding any provision of Virginia law. In arriving at that conclusion the Supreme Court did not expressly ask whether the treaty was self-executing, although the Court did cite evidence that would support a conclusion that it was: namely, that the treaty clearly intended to create specific rights in alien heirs and explicitly contemplated adjudication by U.S. courts, albeit under U.S. law, if disputes arose among those claiming interests in U.S. property. *Id.* at 486–88. Other cases that fail to engage in an explicit self-execution analysis are abundant. *See, e.g.*, Clark v. Allen, 331 U.S. 503, 507–08, 517–18 (1947) (holding, without addressing self-execution, that relevant provisions of the U.S.-Germany Treaty of Friendship, Commerce and Consular Rights guaranteeing reciprocal rights for German and U.S. nationals trumped inconsistent California law); Nielsen v. Johnson, 279 U.S. 47, 49–58 (1929) (holding, without addressing self-execution, that a U.S.-Denmark treaty that guaranteed equal treatment for each state's aliens preempted an Iowa law imposing a special inheritance tax on the estate of a Danish alien); Ford v. United States, 273 U.S. 593, 607–16 (1927) (holding, without explicitly conducting a self-execution analysis, that the Smuggling Convention between the United States and Britain is self-executing); Asakura v. Seattle, 265 U.S. 332, 340–41 (1924) (concluding, without explicit analysis, that a U.S.-Japan treaty guaranteeing reciprocal rights for each state's nationals "operate[d] of itself without the aid of any legislation" and trumped a municipal ordinance); Chew Heong v. United States, 112 U.S. 536, 539–43 (1884) (implicitly concluding that a U.S.-China treaty that guaranteed rights to certain Chinese aliens was self-executing). In other cases, the self-execution analysis is summary. *See, e.g.*, Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) (stating that the Warsaw Convention is self-executing with almost no recorded analysis); Fok Yung Yo v. United States, 185 U.S. 296, 303 (1902) (stating that a Chinese exclusion treaty was self-executing where it preserved an already existent "privilege of transit" under continuing U.S. regulations); United States v. Rauscher, 119 U.S. 407, 419 (1886) (summarily concluding that an extradition treaty with Britain was supreme federal law and that private rights deriving from that treaty could be enforced "in any appropriate proceeding"); United States v. Thompson, 928 F.2d 1060, 1066 (11th Cir. 1991) (summarily agreeing with the district court that the Geneva Convention on the Territorial Sea and the Contiguous Zone "does not create any privately enforceable rights and therefore is not self-executing"); Smith v. Canadian Pac. Airways, Ltd., 452 F.2d 798, 801–02 (2d Cir. 1971) (citing lower court decisions for the conclusion that the Warsaw Convention is self-executing).

38 *See* United States v. Postal, 589 F.2d 862, 876 (5th Cir. 1979) (noting that "[t]he self-execution question is perhaps one of the most confounding in treaty law" and, in practice, is difficult to answer); Vázquez, *supra* note 12, at 695, 722 (noting the difficulty in distinguishing between self-executing and non-self-executing treaties); Vázquez, *supra* note 35, at 1121.

and several circuit courts have provided helpful guidance on how to determine whether a treaty is self-executing and immediately applicable in U.S. courts.

### A. *Intent of the Political Branches*

Most importantly, the courts have indicated that whether a treaty is self-executing is a question of intent.[39] Whose intent—whether that of the parties to the treaty or that of the U.S. political branches—has been a matter of debate.[40] Historically, the Restatement of the Foreign Relations Law of the United States suggested that the intent of the parties to the treaty governed.[41] Over the years, some courts have likewise invoked this rule.[42] The trend, however, has been to turn to the intent of the U.S. political branches.[43] Even courts that have cited

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39 Vázquez, *supra* note 12, at 704.

40 *Id.* at 704–08. Compare, for example, Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976) ("In determining whether a treaty is self-executing courts look to the intent of the signatory parties . . . ."), with the Supreme Court opinions discussed in text.

41 *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 141 cmt. a (1965) ("Whether a particular treaty is self executing depends on the interpretation of the treaty under the rules stated in §§ 147 and 154."); *id.* § 147 ("International law requires that the interpretative process ascertain and give effect to the purpose of the international agreement which, as appears from the terms used by the parties, it was intended to serve."); *id.* § 154 cmt. a ("[A]n international agreement may involve a commitment by the parties that its provisions will be effective under the domestic law of the parties at the time it goes into effect. Under the law of the United States such an agreement would normally be interpreted as self-executing . . . .").

42 *See, e.g.*, Jogi v. Voges, 425 F.3d 367, 377 (7th Cir. 2005); Hamdi v. Rumsfeld, 316 F.3d 450, 468 (4th Cir. 2003), *vacated on other grounds*, 542 U.S. 507 (2004); Goldstar S.A. v. United States, 967 F.2d 965, 968–69 (4th Cir. 1992); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 778 n.2 (D.C. Cir. 1984) (Edwards, J., concurring); British Caledonian Airways Ltd. v. Bond, 665 F.2d 1153, 1160 (D.C. Cir. 1981); *Diggs*, 555 F.2d at 851; *cf.* People of Saipan v. U.S. Dep't of Interior, 502 F.2d 90, 97 (9th Cir. 1974) (citing "the purposes of the treaty and the objectives of its creators" as one factor in the self-execution analysis and finding an "intention to establish direct, affirmative, and judicially enforceable rights" through a Trusteeship Agreement). *But cf.* Atuar v. United States, 156 Fed. App'x 555, 565 (4th Cir. 2005) (Traxler, J., concurring) (citing the President's statements in transmitting the Convention Against Torture to the Senate and the Senate's non-self-execution declaration in concluding that the Convention was non-self-executing); Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 937 (D.C. Cir. 1988) (quoting *Diggs*, 555 F.2d at 851, for the rule that "in 'determining whether a treaty is self-executing' in the sense of its creating private enforcement rights, 'courts look to the intent of the signatory parties as manifested by the language of the instrument'"); Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1283–84 (9th Cir. 1985) (relying on presidential intent, as reflected in a statement of adherence and an executive order, in determining that executive agreements were non-self-executing despite the contrary position of the other state party to the agreements).

43 *See* BARRY E. CARTER, PHILLIP R. TRIMBLE & CURTIS A. BRADLEY, INTERNATIONAL LAW 175 (4th ed. 2003) ("[I]t is arguable that, despite what courts have said, they end up looking primarily to the actual or likely intent of the U.S. treatymakers rather than to the intent of all the

the parties' intent as the governing guidepost have relied, in practice, on U.S. intent in analyzing self-execution.[44]

For example, the Fifth Circuit in *United States v. Postal*[45] explained that the self-execution analysis is an "attempt to discern the intent of the parties to the agreement so as to carry out their manifest purpose."[46] Nonetheless, in conducting its analysis, the court repeatedly invoked the United States' intent as the critical consideration. According to the court,

> the question we must answer is whether by ratifying the Convention on the High Seas the United States undertook to incorporate the restrictive language of [A]rticle 6 [of the Convention], which limits the permissible exercise of jurisdiction to those provided by treaty, into its domestic law and make it available in a criminal action as a defense to the jurisdiction of its courts.[47]

In answering this question, the court looked to several indications of U.S. intent: the United States' failure to manifest a clear, unilateral desire to treat the agreement as self-executing when other parties to the agreement did not recognize self-executing agreements;[48] substantial U.S. legislation and practice that would be automatically altered by a self-executing interpretation of Article 6 and no evidence of intent to effect such a sea change through ratification;[49] legislative testimony from the chairman of the U.S. treaty negotiation team and the State Department indicating that the treaty was non-self-executing;[50] and the presumed U.S. preference to enforce the treaty by foregoing prosecution of defendants seized in violation of Article 6 only when the state of the defendants' nationality protested the violation rather

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ratifying parties."); Vázquez, *supra* note 12, at 705 ("Lower courts in recent years . . . have sought to discern the intent not of the parties to the treaty, but of the U.S. negotiators of the treaty, the President in transmitting it to the Senate for its advice and consent, and the Senate in giving its advice and consent."); *id.* at 705 n.47 (collecting cases).

44 *See, e.g.*, *Jogi*, 425 F.3d at 378 (citing the parties' intent as the relevant standard but also giving great weight to testimony of a State Department official and the position of the U.S. government in concluding that the Vienna Convention on Consular Relations was self-executing); *Frolova*, 761 F.2d at 376 (citing President Ford's statement that the Helsinki Accords were "'neither a treaty nor . . . legally binding on any particular state'" as "forceful evidence that the parties did not intend the Accords to be self-executing" (quoting DEP'T ST. BULL., July 7, 1975, 204, 205) (emphasis omitted)).

45 United States v. Postal, 589 F.2d 862 (5th Cir. 1979).

46 *Id.* at 876.

47 *Id.* at 878.

48 *Id.*

49 *Id.* at 878–81.

50 *Id.* at 881–83.

than whenever a violation technically occurred.[51] Based on these considerations, the Fifth Circuit did "not believe that the United States intended to limit its traditionally asserted jurisdiction over foreign vessels on the high seas by adopting Article 6 of the High Seas Convention" and held that "[t]he determination of this intent must be the touchstone of our interpretation."[52] Although the opinion had indicated early on that self-execution hinged on the parties' intent, the court's ultimate conclusion that Article 6 of the High Seas Convention was not self-executing was based on the intent of the United States. Many other circuit courts have likewise looked to evidence of the United States' intent in analyzing self-execution.[53]

Consistent with these decisions, the Restatement (Third) of the Foreign Relations Law of the United States now explicitly takes the view that "the intention of the United States determines whether an agreement is to be self-executing."[54] This is so because "[i]n the absence of special agreement, it is ordinarily for the United States to

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51 *Id.* at 883–84.

52 *Id.* at 884.

53 *See* Igartúa-de la Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (concluding that the International Covenant on Civil and Political Rights ("ICCPR") was non-self-executing in part because it "was submitted and ratified on the express condition that it would be 'not self-executing'" (quoting 138 CONG. REC. S4781, S4784 (daily ed. Apr. 2, 1992))); Raffington v. Cangemi, 399 F.3d 900, 903 (8th Cir. 2005) (stating that the Convention Against Torture "[a]s ratified by the United States . . . is a non-self-executing treaty"); Auguste v. Ridge, 395 F.3d 123, 132 & n.7, 140 (3d Cir. 2005) (citing the Senate's non-self-execution declaration and Congress's enactment of implementing legislation in concluding that the Convention Against Torture was not self-executing); Guaylupo-Moya v. Gonzales, 423 F.3d 121, 133, 137 (2d Cir. 2005) (concluding that the ICCPR was non-self-executing given the Senate's declaration to that effect); Castellano-Chacon v. INS, 341 F.3d 533, 551 (6th Cir. 2003) (explaining that Article 3 of the Convention Against Torture was not self-executing because the Senate declared as much in endorsing ratification); *In re* Comm'r's Subpoenas, 325 F.3d 1287, 1291 (11th Cir. 2003) (citing statements by the President and State Department in concluding that a Mutual Legal Assistance Treaty with Canada was self-executing because it would be effectuated under existing legislation); United States v. Duarte-Acero, 296 F.3d 1277, 1283 (11th Cir. 2002) (citing the United States' non-self-execution declaration to conclude that relevant provisions of the ICCPR were not self-executing); Dutton v. Warden, 37 Fed. App'x 51, 53 (4th Cir. 2002) (relying on the Senate's non-self-execution declaration and the executive's intent in proposing such a declaration in concluding that the ICCPR was not self-executing); Beazley v. Johnson, 242 F.3d 248, 267 (5th Cir. 2001) (concluding that provisions of the ICCPR were not self-executing as the Senate clearly stated its intent to that effect in a declaration, and collecting cases reaching the same conclusion); Cheung v. United States, 213 F.3d 82, 95 (2d Cir. 2000) (relying on the President's Letter of Transmittal and a report from the Senate Committee on Foreign Relations in finding that an extradition treaty was self-executing); *In re* Erato, 2 F.3d 11, 15 (2d Cir. 1993) (citing a letter from the State Department and the Letter of Submittal to the President in concluding that a Mutual Assistance Treaty with the Netherlands was self-executing).

54 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987).

decide how it will carry out [the] international obligations" it has assumed.[55]

Although the Supreme Court has not been entirely uniform in its approach,[56] the Court appears to favor U.S. intent as its guiding star as well.[57] As early as the decision in *Foster v. Neilson*,[58] which is often cited as the foundation for the self-execution doctrine,[59] the Court turned to evidence from Congress to support its self-execution analysis.[60] In *Foster*, the plaintiff sought to recover property on the authority of a grant made by Spain.[61] The defendant argued that the grant was invalid as it was made after Spain had ceded the land to France, who in turn ceded it to the United States.[62] A U.S.-Spain Treaty of Amity, Settlement, and Limits provided that all grants made by Spain prior to a certain date and within territory since ceded to the United States "shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the

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55 *Id. But cf.* Vázquez, *supra* note 12, at 707–08 (criticizing the Restatement's reasoning and conclusion that U.S. intent governs self-execution).

56 *See* Warren v. United States, 340 U.S. 523, 526–28 (1951) (concluding that a provision of the Shipowners' Liability Convention was executed by general maritime law although evidence from the political branches indicated that implementing legislation was required); *id.* at 531 (Frankfurter, J., dissenting) (reaching the same conclusion); Bacardi Corp. v. Domenech, 311 U.S. 150, 159 (1940) (quoting a provision of the General Inter-American Convention for Trade Mark and Commercial Protection that "the Convention 'shall have the force of law in those States in which international treaties possess that character, as soon as they are ratified by their constitutional organs'" in concluding that the Convention was self-executing); Fok Yung Yo v. United States, 185 U.S. 296, 303 (1902) (arguably analyzing the parties' implicit intent in finding that the treaty provision at issue was self-executing because, *inter alia*, it manifested assent to the continuance of applicable U.S. regulations).

57 In addition to the opinions cited in the text, see Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2694 (2006) (Breyer, J., dissenting) (citing a Senate Executive Report to support the conclusion that the Vienna Convention on Consular Relations is self-executing); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 276 n.5 (1984) (Stevens, J., dissenting) (noting, in a case where both the majority and the dissent found the Warsaw Convention to be self-executing, that the Solicitor General had taken that position as well); Aguilar v. Standard Oil Co., 318 U.S. 724, 738 (1943) (Stone, C.J., dissenting) (citing a letter to the President from the Secretary of State in concluding, consistent with that letter, *see* Warren v. United States, 340 U.S. 523, 526 n.2 (1951), that part of the Shipowners' Liability Convention was self-executing, while part was executory); Maul v. United States, 274 U.S. 501, 530 & n.39 (1927) (Brandeis, J., concurring) (citing Congress's perception that implementing legislation was unnecessary and a communication from the Secretary of State in suggesting that a treaty was self-executing).

58 Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829), *overruled in part by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

59 *See, e.g.*, Paust, *supra* note 13, at 766–67 (asserting that the concept of non-self-execution was "invented" in *Foster*).

60 *See Foster*, 27 U.S. (2 Pet.) at 315–17.

61 *Id.* at 299.

62 *Id.* at 299–300.

territories had remained under the dominion of" Spain.[63] This provision potentially resolved the dispute.[64] The Court, however, concluded that the provision was not self-executing and therefore could not be applied as a rule of decision.[65] The Court based this conclusion, in large part, on the fact that the treaty provided that Spanish grants "shall be ratified and confirmed," rather than "shall be valid" or "are hereby confirmed," and thus contemplated confirmation through legislative enactment.[66] The Court bolstered its finding of non-self-execution by inferring that Congress also understood the treaty to be executory and thus had established a means for confirming grants "embraced by the treaty" within territory not at issue in *Foster*.[67]

Interestingly, in the later case of *United States v. Percheman*,[68] the Court was presented with the equally authoritative Spanish version of this same treaty, which provided that grants "shall remain ratified and confirmed."[69] In light of this language, the Court switched tack and found the provision to be self-executing.[70] In so doing, the Court, one might argue, disregarded the intent of Congress inferred in *Foster*. However, as in *Foster*, the Court in *Percheman* looked to the intent of the political branches to support its conclusion regarding the provision's self-executing character. Thus, the Court noted that "the United States [treatymakers] could have [had] no motive" in insisting on implementing legislation where the law of nations would have secured prior Spanish grants even in the absence of the treaty with Spain.[71] In both of these early cases, then, the Court turned to U.S. intent to bolster its self-execution analysis. Since *Foster* and *Percheman*, the Court has given an even more prominent place to the intent of the political branches in the self-execution inquiry.

In a 1913 case, the Supreme Court was called upon to decide whether the 1900 Treaty of Brussels trumped a prior federal statute

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63 *Id.* at 310 (quotation omitted).

64 *Id.* at 310–14.

65 *Id.* at 314.

66 *Id.* at 314–15 (quotation omitted).

67 *Id.* at 315. Congress enacted no such statute for the territory in which the disputed land was located and thus left that territory subject to an earlier statute that annulled grants of land the title to which had been held by Spain at the time Spain arguably ceded the territory to France. *Id.* at 300, 315–17.

68 United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

69 *Id.* at 88 (quotation omitted).

70 *Id.* at 88–89.

71 *Id.*

and extended the life of a patent issued under that statute.[72] Key to that question was whether the treaty was self-executing.[73] The Supreme Court found that Congress's enactment of legislation to carry the treaty into effect provided near-certain evidence of "the sense of Congress and those concerned with the treaty[74] that it required legislation to become effective."[75] Moreover, the member of Congress in charge of the proposed implementing legislation said that the bill "was to carry [the treaty] into effect."[76] The Court thus focused on U.S. intent in analyzing self-execution. That is not to say that the Court ignored the intent of the other parties to the treaty. The Court relied on the fact that many of the other treaty parties had enacted, or intended to enact, legislation to effectuate the treaty, but did so to bolster its finding that the unequivocal "sense of Congress" was that the treaty required an implementing act.[77]

The Supreme Court similarly focused on the intent of the political branches when, in 1933, it was called upon to decide whether the Prohibition-era Convention for the Prevention of Smuggling of Intoxicating Liquors between the United States and Britain trumped a prior provision of the U.S. Tariff Act.[78] In determining that the Convention was self-executing, the Court relied on the following evidence of the political branches' intent: a letter from the Secretary of State to the Chairman of the House Committee on Foreign Affairs expressing that view, the Treasury Department's issuance of amended instructions to the Coast Guard following ratification of the treaty that treaties of this type should be followed notwithstanding the Tariff Act, and the Solicitor General's representation that the Coast Guard Commandant had been instructed to conduct seizures of British vessels consistent with the treaty.[79]

More recently in *Sosa*, the Court again suggested that it is U.S. intent that governs the self-execution question. The plaintiff in *Sosa* argued that the International Covenant on Civil and Political Rights

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72 Cameron Septic Tank Co. v. City of Knoxville, 227 U.S. 39, 41 (1913).

73 *Id.* at 44.

74 Presumably, this refers to the Secretaries of State and Interior. As the Supreme Court noted, the Secretary of the Interior had drafted a bill to implement the treaty and the Secretary of State had relied on that fact to assuage international concern over the United States' lack of implementing legislation. *Id.* at 49.

75 *Id.*

76 *Id.* at 49–50.

77 *Id.* at 50.

78 Cook v. United States, 288 U.S. 102, 107 (1933).

79 *Id.* at 119 & n.19.

("ICCPR"),[80] to which the United States is a party, created a private cause of action for arbitrary detention.[81] The Court replied that the ICCPR could not itself create rights enforceable in federal courts because the Senate had ratified the ICCPR subject to a declaration that the ICCPR's substantive terms were non-self-executing.[82] If the parties' intent were the controlling inquiry, the Senate's declaration may have been relevant to, but not determinative of, the issue. As it was, the Supreme Court found the Senate's declaration dispositive for self-execution purposes.[83]

The touchstone of the self-execution analysis, then, appears to be the intent of the federal political branches.[84] In some cases, discerning that intent may be easy. An agreement might "expressly provide for legislative execution" of its provision, arguably rendering the agreement executory,[85] or clearly stipulate that implementing legislation is

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80 International Covenant on Civil and Political Rights, Dec. 19, 1996, S. TREATY DOC. No. 95-2, 999 U.N.T.S. 171.

81 Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004).

82 *Id.* at 735; *see also supra* note 53.

83 *Cf.* Vázquez, *supra* note 12, at 706–07 ("If the intent of the U.S. treaty makers were dispositive, unilateral statements reflecting the views of the President and two-thirds of the Senate that the treaty is not self-executing would effectively make the treaty non-self-executing.").

84 That the intent of the United States' political branches is the relevant standard does not mean that the courts will simply defer to executive statements made in litigation regarding the nature of the treaty. *See* Medellin v. Dretke, 544 U.S. 660, 685–86 (2005) (O'Connor, J., dissenting) (noting, in discussing whether Article 36 of the Vienna Convention created private rights, that the executive's "understanding of our treaty obligations" deserves "considerable weight," but "is not beyond debate"); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 154(1) (1965) (stating that courts must decide the self-execution issue when it is presented in litigation).

85 British Caledonian Airways Ltd. v. Bond, 665 F.2d 1153, 1160, 1161 (D.C. Cir. 1981) (concluding that a provision that required action by an international organization rather than by contracting states was self-executing, while a provision requiring contracting states "'to adopt all practicable measures, through the issuance of special regulations or otherwise'" would not be (quoting Convention on International Civil Aviation art. 22, *opened for signature* Dec. 7, 1944, T.I.A.S. No. 1591, 15 U.N.T.S. 295)); *see also* Aguilar v. Standard Oil Co., 318 U.S. 724, 737 n.24 (1943) (taking note of provisions of the Shipowners' Liability Convention that provide that national laws may make exceptions to the Convention); Fok Yung Yo v. United States, 185 U.S. 296, 303, 305 (1902) (finding self-executing a treaty that continued a privilege secured by existing regulations); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 630 (1857) (Curtis, J., dissenting) ("[A] stipulation in a treaty, to legislate or not to legislate in a certain way, has been repeatedly held in this court to address itself to the political or the legislative power, by whose action thereon this court is bound."), *superseded on other grounds by* U.S. CONST. amends. XIII, XIV; Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829), *overruled in part by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833); Cantor v. Cohen, 442 F.3d 196, 207 n.1 (4th Cir. 2006) (Traxler, J., dissenting) (holding that treaty language obligating states "'[to] take all appropriate measures to secure . . . the implementation of the objects of'" a treaty did "not evidence an intent that the agreement be self-executing" (quoting Hague Convention on the Civil Aspects of

not necessary as the treaty is self-executing.[86] In the absence of con-

International Child Abduction art. 2, Oct. 25, 1980, T.I.A.S. No. 11,670, 19 I.L.M. 1501)); *In re* Rath, 402 F.3d 1207, 1210 (Fed. Cir. 2005) (holding Paris Convention for the Protection of Industrial Property non-self-executing because it provided that party states would adopt measures necessary for its implementation); Goldstar S.A. v. United States, 967 F.2d 965, 968–69 (4th Cir. 1992) (finding that where a treaty indicated that party nations would take further action to implement it, that treaty was non-self-executing); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 376 (7th Cir. 1985); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring) ("A treaty that provides that party states will take measures through their own laws to enforce its proscriptions evidences its intent not to be self-executing."); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298–99 (3d Cir. 1979) (holding that a treaty provision by which states undertook to enact laws necessary to secure treaty's application evidenced non-self-execution); United States v. Postal, 589 F.2d 862, 876–77 (5th Cir. 1979) (citing provisions from the Convention on the High Seas that begin, "Every State shall take the necessary legislative measures to . . . ," as examples of provisions that are expressly executory); Robertson v. Gen. Elec. Co., 32 F.2d 495, 500–02 (4th Cir. 1929) (concluding that a treaty stating that nations would extend a particular right was not self-executing); *cf.* Hamdi v. Rumsfeld, 316 F.3d 450, 468 (4th Cir. 2003), *vacated on other grounds*, 542 U.S. 507 (2004); Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1283 (9th Cir. 1985); People of Saipan v. U.S. Dep't of Interior, 502 F.2d 90, 96 & n.6, 103 n.7 (9th Cir. 1974). *But cf.* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 247, 252, 254 nn.25–26, 261 (1984) (holding that, although the Warsaw Convention invites further action by parties, it is nonetheless self-executing); Paust, *supra* note 13, at 774 n.97 (arguing that a treaty provision obliging states to take the necessary measures to ensure the treaty's application should not render the treaty non-self-executing in the United States); Vázquez, *supra* note 12, at 709–10 (same).

Similarly, to the extent that a treaty "purports to accomplish what is within the exclusive lawmaking power of Congress," it is easy to conclude that the treaty was intended to be non-self-executing. *Id.* at 718; *see British Caledonian Airways*, 665 F.2d at 1160 (remarking that whether a treaty is self-executing is a question of interpretation outside of the select few instances in which "the subject matter is within the exclusive jurisdiction of Congress"); Edwards v. Carter, 580 F.2d 1055, 1058–59 (D.C. Cir. 1978) (holding that exclusive constitutional "grants of power to Congress operate to limit the treaty power"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4)(c) & cmt. i (1987) (noting that treaties may be characterized as non-self-executing "if implementing legislation is constitutionally required"); Paust, *supra* note 13, at 777–82 (agreeing with this principle, but arguing that the war power is Congress's only exclusive power). Finally, if a treaty merely requires a state to refrain from acting, some have suggested that it is likely to be considered self-executing. *See* Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 702–03 (1878) ("When it is provided by treaty that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action . . . ."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporters' note 5 (1987) ("[Treaty-imposed o]bligations not to act, or to act only subject to limitations, are generally self-executing."). *But see* Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627, 674–75 (1986) (noting that negative obligations in treaties may be non-self-executing if they are too imprecise); Vázquez, *supra* note 12, at 703 n.41 (arguing that any distinction between treaty obligations to act and not to act in the self-execution analysis are "unworkab[le] and irrelevan[t]").

86 *See* Bacardi Corp. v. Domenech, 311 U.S. 150, 159 (1940) (quoting a provision of the General Inter-American Convention for Trade Mark and Commercial Protection that "the Convention 'shall have the force of law in those States in which international treaties possess that character, as soon as they are ratified by their constitutional organs'" in concluding that the

trary U.S. intent, courts will likely follow the lead of these express provisions.[87] However, in many cases, intent will not be so obvious. Other factors will bear on deciphering implied intent[88] and on the outcome of the self-execution analysis.[89]

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Convention was self-executing); United States v. Percheman, 32 U.S. (7 Pet.) 51, 88–89 (1833) (concluding that a treaty provision was self-executing where the equally authoritative Spanish version provided that "grants 'shall remain ratified and confirmed'" rather than "shall be ratified and confirmed" as had been supposed); McKesson HBOC, Inc. v. Islamic Republic of Iran, 271 F.3d 1101, 1107 (D.C. Cir. 2001) ("If a treaty contains language clearly indicating its status as self-executing, courts regard that language as conclusive."); Am. Express Co. v. United States, 4 Ct. Cust. 146, 159 (1913) (interpreting as self-executing a favored-nation clause providing that any favor granted to a third state "shall immediately become common to" the treaty partner state because a favor "could not immediately become common" if extension of the favor required implementing legislation).

In both of these situations, one might argue that it is the parties' intent that is controlling. Indeed, in the absence of evidence of contrary U.S. intent, the parties' intent may be the best evidence of the United States' intent. Or, put differently, the parties' intent controls to the extent it is consistent with the United States' intent. The ultimate standard, however, is U.S. intent.

87 *Cf.* Igartúa-de la Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (holding that some treaties "may comprise international commitments, but they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' *and is ratified on these terms*" (emphasis added)); *id.* (expressing skepticism that there is room "for courts to second-guess the joint position of the President and the Senate that a treaty is not self-executing"). *But cf.* Halberstam, *supra* note 13, at 92, 95 (arguing, contrary to the suggestion in *Sosa*, that the President and Senate cannot, consistent with the Constitution, declare an otherwise self-executing treaty to be non-self-executing).

88 *Cf.* Vázquez, *supra* note 12, at 711 (arguing that courts' consideration of these additional factors yields "a purely constructive [or imputed] intent (which is to say, no[ ] intent at all)"). As noted later, whether these additional factors are perceived as tools for identifying congressional intent or judicial constructs for maintaining the proper allocation of authority between the political and judicial branches, they form, in connection with the focus on the political branches' intent, a coherent separation of powers analysis. *See infra* note 249 and accompanying text.

89 Occasionally, courts cite a fairly standardized list of factors that may be considered in conducting a self-execution analysis:

> (1) the language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute.

*Frolova*, 761 F.2d at 373; *see* Jogi v. Voges, 425 F.3d 367, 377 (7th Cir. 2005) (listing several of the *Frolova* factors); *People of Saipan*, 502 F.2d at 97 (listing as factors "the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution"); *Boeing Co.*, 771 F.2d at 1283 (quoting the list of factors from *People of Saipan*); *Postal*, 589 F.2d at 877 (same); *see also* Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976) (looking to the signatories' intent "as manifested by the language of the instrument, and, if the instrument is uncertain, . . . the circumstances surrounding its execution"); Iwasawa, *supra* note 85, at 653–86

### B. *Specific Definition*

The first such factor might be called specific definition. Courts considering whether a treaty is self-executing often look to the language of the treaty[90] to determine whether it defines specific obligations that are capable of judicial enforcement.[91] In *Frolova v. Union of Soviet Socialist Republics*,[92] for example, the Seventh Circuit was required to decide whether U.N. Charter Articles 55 and 56 and the Helsinki Accords were self-executing.[93] Article 55 identifies goals of the United Nations, such as "higher standards of living" and "universal respect for . . . human rights."[94] In Article 56, U.N. member states "pledge . . . to take joint and separate action in co-operation with the [United Nations] for the achievement of" these goals.[95] The Court found these articles to be "phrased in broad generalities, suggesting

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(discussing factors courts consider in the self-execution analysis). This Article does not parrot this list, but seeks to repackage the list to better reflect the issues courts actually consider in analyzing whether a treaty is immediately enforceable and to reveal similarities to the factors the *Sosa* Court imposed for applying CIL in federal courts.

Nor are the factors discussed here necessarily exhaustive. The Supreme Court in *Sosa* indicated that additional, unidentified considerations might bear on the incorporation of CIL. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004). Similarly, other considerations arguably might be extracted from past decisions addressing self-execution. See, for example, *Fok Yung Yo*, 185 U.S. at 303, and *In re* Comm'r's Subpoenas, 325 F.3d 1287, 1291 (11th Cir. 2003), in which preexistent domestic law through which treaties might be implemented is cited in concluding that treaties are self-executing. Of course, this preexisting law might have been viewed as implementing legislation, rendering the self-execution question moot, or as evidence of intent that the treaties be immediately enforceable, in which case consideration of preexistent law does not necessarily add a factor to the self-execution analysis. The point, however, is that analysis of the domestic status of both treaties and CIL may embrace additional considerations.

90 *See Frolova*, 761 F.2d at 373 (going so far as to assert that "if the parties' intent is clear from the treaty's language courts will not inquire into [other] factors").

91 *See* INS v. Stevic, 467 U.S. 407, 428 n.22 (1984) ("[T]he language of Article 34" of the U.N. Protocol Relating to the Status of Refugees, which "merely called on nations to facilitate the admission of refugees to the extent possible, . . . was precatory and not self-executing."); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring) (noting that Articles 1 and 2 of the U.N. Charter "contain general 'purposes and principles,' some of which state mere aspirations and none of which can sensibly be thought to have been intended to be judicially enforceable at the behest of individuals"); *Diggs*, 555 F.2d at 851 (finding a U.N. Security Council resolution not self-executing where it did not "confer rights upon individual citizens, . . . provide specific standards," or even establish standards typical of "conventional adjudication," but rather called on governments to take action and invoked standards that were "rooted in diplomacy and its incidents"); Vázquez, *supra* note 12, at 712–15 (discussing courts' consideration of whether a treaty creates obligations or aspirations, and whether the treaty provides determinate standards).

92 Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985).

93 *Id.* at 373.

94 U.N. Charter art. 55.

95 *Id.* art. 56.

that they are declarations of principles, not a code of legal rights."[96] Their broad language did not "indicate[ ] an intent to prescribe 'rules by which private rights may be determined,' or to provide a means by which citizens of the signatory nations could enforce the lofty, but too often unrealized, principles expressed in the Charter."[97] The general language of these provisions undercut a finding that they were self-executing.[98]

The court likewise found that the language of the Helsinki Accords rendered the Accords executory.[99] While the relevant language of the Accords was more specific than that of the U.N. Charter, it was still "phrased in generalities."[100] In addition, the language reaffirmed principles of state sovereignty and nonintervention and provided the signatory states with significant discretion that belied an intent to define specific, judicially enforceable rights.[101]

By contrast, the language of the U.S.-Japan treaty before the Supreme Court in *Asakura v. City of Seattle*[102] was specific, detailed, and imperative, guaranteeing that

> [t]he citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects.[103]

Although the Supreme Court did not expressly discuss the quality of this language, or any other factor, in concluding that this provision was self-executing and trumped a discriminatory municipal ordinance, the specific, detailed nature of the language certainly supported a finding of self-execution.[104]

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96 *Frolova*, 761 F.2d at 374.

97 *Id.* (quoting Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir. 1976)).

98 *Id.*; *see also* Hitai v. INS, 343 F.2d 466, 468 (2d Cir. 1965) (concluding that Article 55 is not self-executing).

99 *Frolova*, 761 F.2d at 375–76.

100 *Id.* at 375.

101 *See id.* at 375–76.

102 Asakura v. City of Seattle, 265 U.S. 332 (1924).

103 *Id.* at 340 (quoting U.S.-Japan Treaty, Apr. 5, 1911, 37 Stat. 1504).

104 *See also* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 247, 252 (1984) (concluding that the Warsaw Convention is self-executing without explicitly relying on the specific, detailed, and mandatory nature of the liability limits the Convention imposes for air carriers); Aguilar v. Standard Oil Co., 318 U.S. 724, 737–38 & n.24 (1943) (concluding, without

Similarly, Article 6 of the Convention on the High Seas, at issue in *United States v. Postal*, "[o]n its face . . . [bore] a self-executing construction because it purport[ed] to" define the specific situations under which foreign states may and may not exercise jurisdiction over vessels on the high seas.[105] Although the Fifth Circuit ultimately held that the context of Article 6 rendered it executory, the Article's specificity pointed toward self-execution.[106]

Article 6 of the Trusteeship Agreement for the Former Japanese Mandated Islands likewise was found to be self-executing where the Agreement was a more detailed embodiment of the general, and presumably non-self-executing,[107] trusteeship provisions of the U.N. Charter.[108] Although "the substantive rights guaranteed through the . . . Agreement [were] not precisely defined," they nonetheless "require[d] little legal or administrative innovation in the domestic fora" and were not "too vague for judicial enforcement," particularly because there were other sources to which a court might look to give the rights content and because the Agreement was the constitutional document for the Trust Territory.[109]

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explicitly referring to the specific, detailed, and imperative nature of a provision of the Shipowners' Liability Convention, that the provision was self-executing); Bacardi Corp. v. Domenech, 311 U.S. 150, 158–61 (1940) (concluding tersely that the General Inter-American Convention for Trade Mark and Commercial Protection is self-executing after, among other things, quoting, but not expressly emphasizing, the specific, detailed, and imperative text of the Convention); *cf.* Clark v. Allen, 331 U.S. 503, 507–08, 514–15, 517 (1947) (quoting the specific, detailed, and imperative language of U.S.-Germany treaty provisions guaranteeing rights to each states' nationals in the course of concluding, without a self-execution analysis, that the provisions, if applicable, trumped California law); Nielsen v. Johnson, 279 U.S. 47, 50 (1929) (quoting the specific, detailed, and imperative language of a U.S.-Denmark treaty regarding reciprocal treatment of aliens that the Court applied without explicitly addressing the self-execution issue); Chew Heong v. United States, 112 U.S. 536, 541–43 (1884) (same with regard to a U.S.-China treaty guaranteeing equal treatment to Chinese aliens).

105 United States v. Postal, 589 F.2d 862, 877 (5th Cir. 1979). Article 6 provides that "[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas." Convention on the High Seas art. 6, para. 1, Apr. 29, 1958, 13 U.S.T. 2312, 2315, 450 U.N.T.S. 82, 86.

106 *Postal*, 589 F.2d at 877–78.

107 While the majority "assume[d] without deciding that" the relevant articles of the U.N. Charter did not "create affirmative and judicially enforceable obligations," People of Saipan v. U.S. Dep't of Interior, 502 F.2d 90, 96 (9th Cir. 1974), Judge Trask, in his concurrence, thought it clear "that the Charter of the United Nations is not self-executing and does not in and of itself create rights which are justiciable between individual litigants," *id.* at 100 (Trask, J., concurring).

108 *Id.* at 96–97 (majority opinion).

109 *Id.* at 97, 99. The Ninth Circuit's willingness to find the Trusteeship Agreement judicially enforceable without more specificity stretches the concept of specific definition. *See id.* at 103 & n.7 (Trask, J., concurring) (arguing that the language of the Trusteeship Agreement was

As these examples reflect, specific definition is a key consideration in the self-execution analysis.[110] Treaties that speak in terms of specific obligations are more likely to be found self-executing than treaties that embody more ethereal commitments.

### C. *Mutuality*

A related consideration is mutuality. In *United States v. Postal*, the Fifth Circuit indicated that when a treaty is multilateral and involves state parties who do not recognize self-executing treaties, greater evidence is required that the United States nonetheless intended the treaty to be self-executing in its courts.[111] The reason, it seems, is that when the United States enters treaties with states that do not permit self-execution, the United States may be offering a self-executing commitment in exchange for an executory promise—a skewed bargain that should not, as a rule, be presumed.[112] The

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insufficiently precise to be self-executing). The Ninth Circuit's willingness seems justified, however, by the unique position of the Trusteeship Agreement. The Agreement had been "codified into the law of the Trust Territory" by the Trust Territory government and was "the plaintiffs' basic constitutional document." *Id.* at 98 (majority opinion); *see id.* at 103 (Trask, J., concurring). Judicial enforcement of constitutional texts routinely requires interpretation of rather vague terms. *See id.* at 99 (majority opinion). As a result, the court seemed more willing to find the Agreement judicially enforceable notwithstanding some lack of specificity. *See id.* Had the Trusteeship Agreement been a stand-alone treaty that had not been codified as domestic constitutional law, greater specificity presumably would have been required before finding the Agreement self-executing.

110 *See also* Fok Yung Yo v. United States, 185 U.S. 296, 303 (1902) (finding a treaty provision dealing with alien transit to be self-executing where it, among other things, "dealt with the subject specifically").

111 *Postal*, 589 F.2d at 878. *But cf.* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987) ("Whether an agreement is or is not self-executing in the law of another state party to the agreement is not controlling for the United States.").

112 *See Postal*, 589 F.2d at 878, 882–83 (expressing concern for "mutuality" and "reciprocal obligations"). The assumption that the commitments of states that do not recognize self-execution are less valuable has been criticized as a factual matter on two grounds. First,

> in many (if not most) [ ] such states there exists a cabinet form of government in which executive and legislative powers are merged. In such situations, the government in power is in practice able to get the necessary parliamentary implementation almost as surely and as efficiently as if the agreement were self-executing. In states where the ratification process requires general legislative approval, implementing legislation is introduced as a part of the ratification process.

RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 154 reporters' note 1 (1965). Second, "whether or not a treaty or provision will be self-executing for a particular state party, and any lack of mutuality in this respect, have generally not been considerations when states enter into treaty obligations." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporters' note 5 (1987).

The view that U.S. courts should be more reluctant to find a treaty self-executing when it

skewed bargain does not result merely because a treaty is multilateral, as multilateral treaties may involve only states in which treaties are or may be self-executing. Thus, whether a treaty is bi- or multi-lateral is not determinative. Nor does an unbalanced bargain arise in every instance involving a state that does not permit self-execution. As the court in *Postal* recognized, a bilateral treaty with Britain, which typically does not recognize self-execution,[113] could be self-executing in the United States where the treaty nonetheless created "mutual rights and obligations."[114] Thus, the Smuggling Convention was self-executing where it secured for the United States authority to board British vessels outside U.S. territorial waters and provided British vessels the right to bring "liquor into the United States under seal in certain specified circumstances" as well as "a mechanism for settling claims" arising from the United States' improper use of its treaty powers.[115] At the heart of this consideration, then, is concern for mutuality—a treaty is more likely to be found self-executing in the United States when other state parties have accepted self-executing obligations or when the treaty immediately secures rights to its parties.

### *D. Practical Consequences*

Likewise, a treaty is more likely to be found self-executing when such a finding would not trigger broad or untoward consequences. The consequences of finding Article 6 of the High Seas Convention self-executing led the Fifth Circuit in *United States v. Postal* to conclude that the United States did not intend such consequences to result from ratification.[116] Article 6 provides that ships on the high seas

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involves states that do not permit self-execution has also been criticized as a conceptual matter. *See id.* (explaining that such a rule is misguided because self-execution facilitates the United States' compliance with its treaty obligations and because another state's material default on its obligations would entitle the United States to terminate or suspend its obligations); John M. Rogers, *Prosecuting Terrorists: When Does Apprehension in Violation of International Law Preclude Trial?*, 42 U. MIAMI L. REV. 447, 462–65 (1987) (arguing that the mutuality consideration undercuts constitutional authority to enter treaties that are supreme domestic law); Vázquez, *supra* note 12, at 704 (arguing that the Supremacy Clause does not prevent a treaty from being "'self-executing' in the United States even if it is 'non-self-executing' for other nations" and that the parties to a treaty should be required to clearly state any "intent to alter [that] principle"). Notwithstanding these criticisms, the concept of mutuality has played a role in the self-execution analysis of U.S. courts, supporting a finding of self-execution when mutuality of commitment exists.

113 *Postal*, 589 F.2d at 878 n.24; Vázquez, *supra* note 12, at 697 & n.12.

114 *Postal*, 589 F.2d at 882.

115 *Id.* at 882–83.

116 *Id.* at 878–81; *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 810 (D.C. Cir. 1984) (Bork, J., concurring) (concluding that the Hague Conventions on the Laws of War were

"'shall be subject to [the] . . . exclusive jurisdiction'" of the state under whose flag they sail, "'save in exceptional cases expressly provided for in international treaties or in these articles.'"[117] As the Fifth Circuit recognized, the United States had, since inception, asserted jurisdiction on the high seas beyond the limits imposed by Article 6.[118] In 1790, the United States enacted a statute that authorized the boarding of foreign vessels outside U.S. territorial waters but within twelve miles of the U.S. coast.[119] This statute, upheld by the Supreme Court, spawned similar succeeding statutes that have continued to the present and that have also been reviewed by U.S. courts.[120] Other statutes, both preceding and succeeding the High Seas Convention, have authorized U.S. jurisdiction even beyond twelve miles for certain purposes.[121] Recognizing Article 6 as self-executing would have invalidated all of these statutes to the extent they conflicted with Article 6 and were enacted before the Convention was ratified.[122] The consequences of finding Article 6 to be self-executing were therefore broad and inconsistent with past and present U.S. policy.[123]

Had the consequences been more narrow, as was the case with the Smuggling Convention, which affected "the jurisdiction of the United States only [with regard to] seizures of British vessels engaged in smuggling liquor," the court might have reached a different result, as it did with the Smuggling Convention.[124] As it was, Article 6 of the High Seas Convention amounted to "a sweeping prohibition on the

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non-self-executing and not available to private plaintiffs, as a contrary finding "could create perhaps hundreds of thousands or millions of lawsuits" by victims of "large-scale war" that might overreach "the capacity of any legal system" and present "an obstacle to the negotiation of peace and the resumption of normal relations between nations"); *cf.* Sale v. Haitian Ctrs. Council, 509 U.S. 155, 177 (1993) (reasoning that the United States did not silently assume an obligation to aliens outside its borders in ratifying the United Nations Protocol Relating to the Status of Refugees given the broad consequences of assuming such an obligation); Robertson v. Gen. Elec. Co., 32 F.2d 495, 500 (4th Cir. 1929) ("Treaties . . . ought not to interfere with the [complicated] domestic machinery which the several countries have provided for the regulation of patents.").

117 *Postal*, 589 F.2d at 869 (quoting Convention on the High Seas, *supra* note 105, 13 U.S.T. at 2315, 450 U.N.T.S. at 86).

118 *Id.* at 879. Article 6 would permit some, but not all, of the control the United States had exerted outside its territorial waters. *See id.* at 880–81 & n.30.

119 *Id.*

120 *Id.* at 879–80 & nn.28–29. These succeeding statutes include 19 U.S.C. §§ 1401(j), 1709(c), 1581, 1586 (2000).

121 *Postal*, 589 F.2d at 880 & n.30.

122 *See id.* at 878 & n.25.

123 *See id.* at 880–81 & n.30, 883.

124 *Id.* at 883.

exercise of jurisdiction against foreign vessels on the high seas,"[125] and the court concluded that Article 6 was non-self-executing.[126]

### *E. Foreign Relations Effects*

While the practical consequences of self-execution may vary, one consequence has played a particular role in self-execution analysis: the foreign affairs effects of self-execution. Relevant effects include the impact on relations with other states, on the proper distribution of authority to conduct foreign affairs, and relatedly, on the political branches' discretion to conduct foreign affairs. The relevance of the first effect—the impact on relations with other states—was illustrated in *Frolova v. Union of Soviet Socialist Republics*[127] as well as in the Supreme Court's opinion in *Asakura v. City of Seattle*.[128] In *Frolova*, as noted above,[129] a U.S. plaintiff argued that Articles 55 and 56 of the U.N. Charter as well as the Helsinki Accords were self-executing and prevented the Soviet Union from claiming sovereign immunity in plaintiff's damage suit challenging the Soviet Union's failure to permit her husband, a Soviet citizen, to emigrate to the United States.[130] The Soviet Union had twice refused the husband's emigration application due to "bad relations with the United States" and because his "departure was not in the interest of the Soviet State."[131] In deciding whether Articles 55 and 56 and the Helsinki Accords were self-executing, the Seventh Circuit noted that "judicial resolution of cases bearing significantly on sensitive foreign policy matters . . . might have serious foreign policy implications which courts are ill-equipped to anticipate or handle."[132] *Frolova* was just such a case. "Soviet emigration policies [had] been the subject of a long-running battle between American policymakers and the Kremlin, often generating conflict between the White House and Congress. Judicial intervention into such

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125 *Id.*

126 *See id.* at 884. *But cf.* Rogers, *supra* note 112, at 464 (characterizing the *Postal* court's reasoning in this regard as effectively finding the Convention to be non-self-executing because the United States had not intended to comply with its provisions). By contrast, the fact that the treaty provision at issue in *People of Saipan* dealt with "the local economy and environment, not [the more sensitive, far-reaching, not to mention discretionary, issue of] security," supported a finding that the provision was self-executing. People of Saipan v. U.S. Dep't of Interior, 502 F.2d 90, 97 (9th Cir. 1974).

127 Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985).

128 Asakura v. City of Seattle, 265 U.S. 332 (1924).

129 *See supra* notes 93–101 and accompanying text.

130 *Frolova*, 761 F.2d at 371, 373.

131 *Id.* at 371 (quotations omitted).

132 *Id.* at 375.

a delicate political issue would be ill-advised and could have unforeseen consequences for American-Soviet relations."[133] As a result, the court declined to find Articles 55 and 56 or the Helsinki Accords self-executing and privately enforceable.[134]

This is not to suggest that any impact on foreign affairs renders a treaty executory in U.S. courts. In *Asakura*, the Supreme Court noted that "[t]reaties for the protection of citizens of one country residing in the territory of another are numerous, and make for good understanding between nations"; indeed, the treaty the United States and Japan entered along these lines "was made to strengthen friendly relations between [them]."[135] The Court suggested that the foreign affairs benefits of these treaties support finding them self-executing, at least when the self-executing nature of the treaty is otherwise clear and when the self-execution issue is forced by state or local legislation that undercuts the treaties' foreign affairs benefits.[136]

The foreign affairs benefits of self-execution may also justify such a finding when self-execution would both improve relations with other states and, consistent with another foreign affairs concern that courts consider, not unduly infringe on the United States' discretion to conduct foreign affairs. To illustrate, the court in *Postal* noted that the United States entered the Smuggling Convention with Great Britain to validate seizures of foreign vessels outside U.S. territorial waters, but also "to avoid the repeated [and inevitable] protests that the British . . . lodged against . . . seizures" of British vessels outside those waters.[137] Absent these protests, U.S. law, under the doctrine of *Ker v. Illinois*,[138] might have sanctioned U.S. jurisdiction over defendants

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133 *Id.*

134 *See id.* The result was that the plaintiff had to resort to "diplomatic channels and the court of world opinion," rather than U.S. courts, if she wished to pursue her claim. *Id.*; *see also id.* at 376 ("Individuals aggrieved by the failure of nations to implement [non-self-executing treaties] will have to be content with the principle that violations of international agreements are normally to be redressed outside the courtroom." (internal quotation marks omitted)).

135 Asakura v. City of Seattle, 265 U.S. 332, 341 (1924).

136 *Cf.* Chew Heong v. United States, 112 U.S. 536, 540 (1884) (suggesting that concern for the United States' reputation for treaty compliance supports a presumption that federal legislation was not intended to abrogate a treaty).

137 United States v. Postal, 589 F.2d 862, 883 (5th Cir. 1979).

138 Ker v. Illinois, 119 U.S. 436 (1886). *Ker*, together with the decision in *Frisbie v. Collins*, 342 U.S. 519 (1952), established the rule that unlawful seizure of a defendant ordinarily does not affect the court's authority to try the defendant. *See Ker*, 119 U.S. at 444; *Frisbie*, 342 U.S. at 522. However, an exception to the rule has been recognized where the seizure occurs in violation of a self-executing treaty. *See, e.g.*, United States v. Best, 304 F.3d 308, 313–14 (3d Cir. 2002).

so seized even if a treaty violation had technically occurred.[139] As a result, the United States would retain discretion over the decision to seize British vessels. However, where British objection appeared inevitable and where objection raised the possibility that U.S. law would not permit jurisdiction resulting from seizures in violation of a treaty, finding the Smuggling Convention to be self-executing both improved U.S. foreign relations with Great Britain and did not limit the political branches' foreign affairs discretion more than U.S. law might have. Both the concern for relations with other states and the concern over limiting the United States' foreign affairs discretion permitted a finding that the Smuggling Convention was self-executing.

In contrast to Britain's inevitable protest of U.S. seizures outside territorial waters, the *Postal* court noted that some states might not object to U.S. seizures in violation of Article 6 of the High Seas Convention.[140] Indeed, the record in *Postal* disclosed no protest from the Grand Cayman Islands over the high-seas seizure of a vessel registered in the Islands that was transporting multiple tons of marijuana.[141] Finding Article 6 to be executory would have allowed the United States to engage in seizures in such situations (where seizure would not sour foreign relations), whereas a conclusion that Article 6 was self-executing would have automatically divested the United States of jurisdiction to conduct the seizure and resulting prosecution, even in the absence of a protest.[142] Interests in preserving the United States' discretion to engage in noncontroversial seizures in violation of Article 6 led the court to find Article 6 executory.[143]

Intimately related to preserving foreign affairs discretion and maintaining positive relations with other states, at least one other foreign affairs concern influences courts' self-execution analysis: a more basic concern for the distribution of foreign affairs authority. The D.C. Circuit, for example, concluded that a U.N. Security Council resolution, which restricted states' interactions with South Africa due to

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139 *Postal*, 589 F.2d at 883; *see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 cmt. c (1987) (noting that if a state abducts a person in the territory of another state without consent, and "[i]f the state from which the person was abducted does not demand his return, under the prevailing view the abducting state may proceed to prosecute him under its laws"). More recently, the Supreme Court has said that "it would appear that a court must enforce [a self-executing treaty] on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation." United States v. Alvarez-Machain, 504 U.S. 655, 667 (1992).

140 *Postal*, 589 F.2d at 883.

141 *Id.* at 883–84; *see id.* at 866–68.

142 *Id.* at 884.

143 *See id.*

its occupation of Namibia, was executory in part because the terms of the resolution dealt "with the conduct of our foreign relations, an area traditionally left to executive discretion."[144] To the extent that enforcement of a treaty would lead the courts to disturb the distribution of authority between the judiciary and political branches, a court is more likely to find the treaty executory.

### *F. Alternative Enforcement Mechanisms*

Finally, several courts have mentioned "the availability and feasibility of alternative enforcement mechanisms" as a factor to consider in self-execution analysis.[145] Typically, this factor has received little consideration. In *People of Saipan v. United States Department of Interior*,[146] the Ninth Circuit noted in passing that the plaintiffs' alternative forum for pressing their treaty claim against the United States—the Security Council—"would present to the plaintiffs obstacles so great as to make their [treaty] rights virtually unenforceable."[147] Because the court "refuse[d] to leave the plaintiffs without a forum which [could] hear their claim," the absence of adequate alternative means of enforcing the treaty supported a finding of self-execution.[148] By contrast, the availability of a viable alternative enforcement mechanism would tend to render a treaty executory.

In sum, in determining whether a treaty is self-executing and therefore enforceable in the absence of implementing legislation, U.S. courts consider the intent of the political branches, specific definition, mutuality, practical consequences, foreign relations effects, and alternative means of enforcement. If these factors point toward a finding of self-execution, courts take the lead in applying a treaty as U.S. law. If, instead, a treaty is non-self-executing, courts must wait for Congress to render the treaty enforceable through implementing legislation. As a result, some, but not all, treaties are immediately enforceable in U.S. courts.

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144 Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976).

145 Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985); *Postal*, 589 F.2d at 877; People of Saipan v. U.S. Dep't of Interior, 502 F.2d 90, 97 (9th Cir. 1974).

146 People of Saipan v. U.S. Dep't of Interior, 502 F.2d 90 (9th Cir. 1974).

147 *Id.* at 97–98.

148 *Id.* at 100; *see also* Iwasawa, *supra* note 85, at 683 (citing, sometimes critically, additional cases where alternative means of enforcement affected the self-execution analysis).

### *III. The Supreme Court's Treatment of CIL in* Sosa

In contrast to this variable approach to judicial enforcement of treaties, the scholarly majority has maintained that CIL is automatically enforceable in federal courts as federal common law.[149] As noted, this view has been contested by a minority of scholars who believe that the political branches must take the lead in incorporating CIL.[150] The Supreme Court in *Sosa v. Alvarez-Machain*[151] waded into this debate, providing guidance on CIL's status in federal courts. The guidance provided bears a striking resemblance to the analysis, just discussed, that U.S. courts use to determine whether treaties are judicially enforceable. The result of this confluence is the apparent emergence of a unified, but as yet unnoticed, doctrine governing the status of treaties and CIL as rules of decision applicable in federal courts absent implementing legislation from Congress. The relief of this doctrine becomes visible as this Part charts the analysis of *Sosa* against the background of the self-execution analysis outlined above.

In *Sosa*, the Supreme Court was faced with the cross-border abduction of Mexican citizen Humberto Alvarez-Machain ("Alvarez").[152] The abduction, approved by the U.S. Drug Enforcement Agency ("DEA") in order to bring Alvarez to trial in the United States for his alleged role in the murder of a DEA agent in Mexico, was effected by Jose Francisco Sosa, also a Mexican citizen, who kidnapped Alvarez in Mexico and delivered him to federal authorities in Texas.[153] After Alvarez was tried and acquitted in the United States, he returned to Mexico and brought suit against Sosa in a U.S. district court under the ATS to recover from Sosa's alleged violation of the law of nations.[154] The lower courts granted and upheld a damage award on Alvarez's ATS claim, the Ninth Circuit asserting "that [the ATS] not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations."[155] The accuracy of this assertion was at the heart of the ATS case before the Supreme Court.[156] The Court ultimately agreed with Sosa and the government that the ATS was a jurisdictional statute

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149 *See supra* notes 18–26 and accompanying text.

150 *See supra* notes 18–26 and accompanying text.

151 Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

152 *Id.* at 697–98.

153 *Id.*

154 *Id.* at 698.

155 Alvarez-Machain v. United States, 331 F.3d 604, 612 (9th Cir. 2003) (en banc), *rev'd sub nom. Sosa*, 542 U.S. 692.

156 *Sosa*, 542 U.S. at 712. The appeal to the Supreme Court also raised and resolved a

only.[157] However, this conclusion opened the door for the Court to consider another question: whether federal courts nonetheless had authority to recognize causes of action based on CIL.[158]

### A. *Intent of Congress*

The Supreme Court answered this question by explaining that, as a general rule, federal courts' authority to recognize causes of action based on CIL turns on congressional intent. Historically, CIL was treated as general common law,[159] part of the "brooding omnipresence"[160] equally discoverable by federal and state courts and derivative of neither authority.[161] As a result, in the pre-*Erie* era in which the ATS was enacted, federal courts were free to recognize causes of action based on CIL, and the ATS assured jurisdiction to hear those claims.[162] Today, federal courts' authority is significantly different.

As the Court explained (in a primer on post-*Erie* federal common law), "the prevailing conception of the common law has changed since

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Federal Tort Claims Act issue that is not material to the subject of this Article. *See id.* at 699–712.

157 *Id.* at 712, 724; *cf.* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 810 (D.C. Cir. 1984) (Bork, J., concurring) (concluding that the ATS "is merely a jurisdiction-granting statute and not the implementing legislation required by non-self-executing treaties to enable individuals to enforce their provisions").

158 *Sosa*, 542 U.S. at 714.

159 *See id.* at 739 (Scalia, J., concurring in part); Bradley, Goldsmith & Moore, *supra* note 27 (noting pre-*Sosa* disagreement on this point, but explaining that *Sosa* clarified that CIL was general law pre-*Erie*); Young, *supra* note 1, at 374 & n.43, 393–94 & n.143 (collecting and discussing authorities).

160 S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

161 *See Sosa*, 542 U.S. at 740 (Scalia, J., concurring in part) (noting that "the general common law was neither" state nor federal law); Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (criticizing the notion, undergirding the general common law, that there exists "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute"); Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note 4, at 823–24, 852 (recounting that prior to *Erie*, CIL was part of the transcendental general common law "that did not emanate from a particular sovereign authority" and that was applied independently by state and federal courts); Dodge, *supra* note 26, at 89–90 & n.14 ("There is widespread agreement that, when the Constitution was adopted and the First Judiciary Act was passed, the law of nations was understood to be general common law, which was binding on both federal and state courts."); Ku & Yoo, *supra* note 2, at 202 (explaining that "[p]rior to the seminal case of *Erie*, most scholars agree that CIL formed part of the general common law" and, as a result, neither state nor federal courts were bound by the interpretations of the other); *Leading Cases*, *supra* note 26, at 451 ("In 1789, the law of nations clearly was considered part of the general common law, that 'brooding omnipresence' recognized rather than created by federal and state judges alike." (footnote omitted)).

162 *Sosa*, 542 U.S. at 724; *see also* Ku & Yoo, *supra* note 2, at 202.

1789 in a way that counsels restraint in judicially applying internationally generated norms."[163] Today it is clear that common law "is not so much found or discovered as it is either made or created."[164] In part as a result of this new understanding of the nature of common law, the authority of federal courts to create common law, and to apply CIL as common law, is fundamentally different than it once was. Now, although there exist "limited enclaves in which federal" common law may be made,[165] "the general practice [is] to look for legislative guidance before exercising innovative authority over substantive law."[166] This rule has been recognized repeatedly in the context of fashioning common-law causes of action.[167] In that context, the rule serves to ensure that important policy decisions, such as the proper means of enforcing a law regulating primary conduct, are left to the legislature.[168] More generally, the rule serves to preserve a separation of powers in which Congress retains principal lawmaking authority within the federal government.

The Court made clear that this general rule applies even when the common-law cause of action to be created is based on CIL, as evidenced by its focus on whether the legislature had authorized federal courts to create common-law causes of action to be heard pursuant to ATS jurisdiction. Had the Court believed that the federal judiciary possessed unlimited authority to incorporate CIL into domestic law, this focus on congressional authorization would have been unnecessary. The Court simply could have stated that federal courts have (a) common-law authority to create causes of action based on CIL and (b) jurisdiction to hear such claims under either the ATS (on the theory that the scope of ATS jurisdiction did not change merely because federal courts now incorporate CIL as federal common law rather than as general common law)[169] or the general federal question

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163 *Sosa*, 542 U.S. at 725.

164 *Id.*

165 *Id.* at 729; *see also id.* at 724–25, 729–30 & n.18 (noting that CIL is not "categorically precluded" from incorporation as federal common law).

166 *Id.* at 726; *see also id.* at 741–42 (Scalia, J., concurring in part).

167 *Id.* at 727; *cf.* Stephens, *Corporate Liability*, *supra* note 26, at 999 (reasoning that "[i]f the Supreme Court considered the [ATS] as if it were enacted today, . . . the Court would likely hold that it" creates jurisdiction but not a cause of action as "[t]he Court today does not infer causes of action, but rather requires Congress to give specific authorization for such claims").

168 *Sosa*, 542 U.S. at 727.

169 *Cf. Leading Cases*, *supra* note 26, at 453–54 (remarking that *Sosa* provides some support for the view that CIL is "not necessarily incorporated within post-*Erie* federal common law," but that courts retain CIL "lawmaking authority because the process of 'recognizing' (rather than

statute.[170] Indeed, Justice Scalia explicitly suggested that the general federal question statute would work as well as the ATS not only as a basis for jurisdiction,[171] but also for the creation of common law based on CIL, if there were "some [post-*Erie*] residual power . . . to create federal causes of action in cases implicating foreign relations."[172] But the Court rejected the suggestion that federal courts may incorporate CIL under the general federal question statute and explained that the federal courts' authority to create new causes of action based on CIL derived from Congress's unique intent in enacting the ATS.[173] That

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creating) federal general common law before *Erie* [is] the same as the process of 'recognizing' norms of [CIL] since then").

170 *See Sosa*, 542 U.S. at 745 n.* (Scalia, J., concurring in part); Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972); Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note 4, at 847–48 & nn.210–11; Note, *An Objection to* Sosa*—and to the New Federal Common Law*, 119 HARV. L. REV. 2077, 2094 (2006).

171 *Sosa*, 542 U.S. at 745 n.* (Scalia, J., concurring in part); *see also* Stephens, *Human Rights Litigation*, *supra* note 26, at 542 (recognizing that if CIL is federal law, the general federal question statute would provide jurisdiction for CIL claims, rendering the ATS unnecessary). The *Sosa* majority arguably did not respond to Justice Scalia's assertion that § 1331, the general federal question statute, would be an equally good fount of jurisdiction for common-law causes of action created under the congressional authorization implied from the ATS. *Compare Sosa*, 542 U.S. at 745 n.* (Scalia, J., concurring in part), *with id.* at 731 n.19 (majority opinion). Although Professor Dodge has suggested that the majority did hold that § 1331 would not provide jurisdiction for CIL-based causes of action, that conclusion seems to have resulted from conflation of two questions: (a) whether the general federal question statute authorized the creation of CIL-based common law (to which the majority responded in the negative as there was no indication of congressional intent to authorize such power pursuant to § 1331), and (b) whether the general federal question statute can provide jurisdiction for common-law causes of action authorized by Congress's intent behind the ATS (which the majority seemed to ignore). *See* Dodge, *supra* note 26, at 96–97. This conflation leads to Professor Dodge's novel suggestion that CIL "may be federal common law for purposes of the ATS, but not for the purposes of § 1331." *Id.* at 97; *see also id.* at 100. Understanding the majority's focus on congressional intent as the source of authority to create CIL-based common law eliminates the need to recognize such a unique form of federal common law.

172 *Sosa*, 542 U.S. at 745 n.* (Scalia, J., concurring in part).

173 *Id.* at 731 n.19 (majority); *see* Swaine, *supra* note 26, at 1529 (arguing that *Sosa*'s holding was based on congressional delegation to the federal courts of "modest authority to reckon [CIL]"); *cf.* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) (suggesting that, had Congress so intended, the ATS could "authorize tort suits for the vindication of any international legal right"). Thus, although the Court recognized that in *Erie*'s wake there are "limited enclaves" of acceptable federal-common-law-making and that Supreme Court precedent treating international law as part of U.S. law does not "preclude" federal courts from ever recognizing as federal common law "international norms intended to protect individuals," *Sosa*, 542 U.S. at 729–30 & n.18; *see also id.* at 724–25, the Court did not suggest that federal courts have independent authority to incorporate CIL as common law. Rather, the Court indicated that the authority to engage in such common-law-making derives, as a rule, from Congress. *See, e.g.*, *id.* at 726. The Court's reliance on the unique intent behind the ATS does, however, raise questions about when a jurisdictional grant may evince an intent to

intent was discerned through an extensive analysis of the motives of both the First and subsequent Congresses.[174]

The First Congress included the ATS within the Judiciary Act of 1789.[175] As originally enacted, the ATS provided federal district courts "cognizance, concurrent with the courts of the several States, or the circuit courts, . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[176] The ATS's inclusion in the Judiciary Act, which otherwise exclusively addressed federal jurisdiction; the use of the term "cognizance," which "bespoke a grant of jurisdiction, not power to mold substantive law"; and the fact that the First Congress would have been aware of "the distinction between jurisdiction and a cause of action" all led to the easy conclusion that the ATS "was intended as jurisdictional."[177]

That conclusion did not preclude an implied intent that federal courts recognize causes of action based on CIL, however.[178] The Court therefore turned to assessing whether Congress impliedly authorized federal courts to create common-law causes of action based on CIL.[179] The history surrounding the ATS was sparse and equivocal, but permitted the Court to draw two inferences regarding Congress's intent.[180] First, Congress did not intend the ATS to lie fallow until some future Congress or state provided or authorized the creation of a cause of action that could be heard pursuant to ATS jurisdiction.[181] Second, "Congress intended the ATS to furnish jurisdiction

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confer common-law-making authority. *See* Bradley, Goldsmith & Moore, *supra* note 27; *Leading Cases*, *supra* note 26, at 455–56.

174 *See* Stephens, *Human Rights Litigation*, *supra* note 26, at 543 ("The Supreme Court resolved the debate [regarding the ATS's import] by working carefully through the available information about the intent of those who enacted the statute."); *id.* at 549.

175 *Sosa*, 542 U.S. at 712.

176 *Id.* at 712–13 (quoting Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 23, 77).

177 *Id.* at 713–14; *cf. Tel-Oren*, 726 F.2d at 810 (Bork, J., concurring).

178 This is where the majority and Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) part company. While the majority believed that the intent of the First and subsequent Congresses could survive *Erie* to allow federal courts to recognize new, though limited, CIL-based causes of action, Justice Scalia believed that the wholly different nature of post-*Erie* common law precluded such a finding. *Compare Sosa*, 542 U.S. at 724–25, 729–31, *with id.* at 744–46 (Scalia, J., concurring in part). *Cf.* Dodge, *supra* note 26, at 95–96.

179 *See Sosa*, 542 U.S. at 714.

180 *See id.* at 718–19 (noting that "[t]here is no record of congressional discussion about private actions that might be subject to" ATS jurisdiction "or about any need for further legislation to create private remedies," and that scholarly debate has yielded no "consensus understanding of what Congress intended").

181 *Id.* at 719; *see also id.* at 720–21.

for a relatively modest set of [common-law] actions alleging violations of the law of nations."[182]

The First Congress's intent that federal courts recognize a limited number of common-law causes of action based on the law of nations was easy to achieve at the time the ATS was enacted, as federal courts could legitimately apply CIL as general federal common law.[183] In light of *Erie*, however, federal courts no longer enjoy that authority.[184] *Erie*'s restriction of federal judicial authority, however, did not defeat the First Congress's intent.[185] The Court concluded that that intent survived *Erie* and continued to provide authority for limited recognition of CIL-based common law, particularly given the intent of more recent Congresses.[186]

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182 *Id.* at 720; *see id.* at 721. The historical evidence supporting these inferences included the following: (a) at the time the ATS was enacted, the law of nations recognized three offenses that could be judicially enforced against individuals—"violation of safe conducts, infringement of the rights of ambassadors, and piracy"—which were probably what the ATS drafters had in mind when they referred to suits by aliens for torts in violation of the law of nations, *id.* at 715; (b) these violations had been of special concern in the United States because the lack of a centralized government authorized to provide judicial remedies for these violations had given rise to foreign relations concerns in the period following independence through the Articles of Confederation, *id.* at 715–17 & n.11; (c) as a result of this lack of authority, and to ameliorate its consequences, the Continental Congress twice called on states to enforce rights based on the law of nations, *id.* at 716–17; (d) the concern over the centralized government's inability to enforce the law of nations persisted in the Constitutional Convention, which drafted a Constitution "vesting the Supreme Court with original jurisdiction over 'all Cases affecting Ambassadors, other public ministers and Consuls,'" *id.* at 717 (quoting U.S. CONST. art. III, § 2); (e) similarly, the First Congress not only enacted the ATS but also recognized the three offenses above as criminal, reinforced the Supreme Court's "original jurisdiction over suits brought by diplomats," and authorized alienage jurisdiction, *id.* at 717; (f) the presumed principal drafter of the ATS had been in both the Continental Congress that first called for state enforcement of the law of nations and the one state legislature that responded to the call, *id.* at 719; (g) the Attorney General in 1795 opined that the ATS opened the federal courts to a tort suit, presumably based on common-law causes of action, "against Americans who had taken part in the French plunder of a British slave colony in Sierra Leone," *id.* at 721; and (h) a district court decision from the same year suggested that some torts in violation of the law of nations fell within the common law and were subject to ATS jurisdiction, while a district court decision in 1793 held that the ATS could not provide jurisdiction for a suit not based only on tort, but did not suggest that additional legislation would be necessary to confer jurisdiction in a suit seeking only tort recovery, *id.* at 720. Some have criticized the Court's historical evidence as very weak. *See* Ku & Yoo, *supra* note 2, at 171.

183 *See* Stephens, *Corporate Liability*, *supra* note 26, at 999 ("It seems . . . clear that, during the late eighteenth century, members of Congress would not have seen any need to explicitly create a cause of action for international law violations because they understood that such claims could be based on common law.").

184 *See supra* notes 162–64 and accompanying text.

185 *See Sosa*, 542 U.S. at 730–31.

186 *Id.*; *see also* Stephens, *Corporate Liability*, *supra* note 26, at 999 (noting that the Court in *Sosa* tried to effectuate the intent of the First Congress despite intervening changes in our legal system).

More recent Congresses, like the First Congress, have implied an intent to allow federal courts to recognize limited causes of action that fit within the ATS's jurisdictional grant.[187] Following the Second Circuit's 1980 decision in *Filartiga v. Pena-Irala*,[188] federal courts assumed authority to recognize causes of action based on the law of nations.[189] Judicial disagreement with this practice was joined in 1984 when Judge Bork, in the D.C. Circuit's fractured opinion in *Tel-Oren v. Libyan Arab Republic*,[190] concluded that the ATS was a jurisdictional statute and did not create a cause of action.[191] In the two decades since these opinions, Congress has never expressed disagreement with the decisions arising from *Filartiga*.[192] Instead, in the wake of the D.C. Circuit's dismissal of the ATS suit in *Tel-Oren*, Congress enacted the Torture Victim Protection Act ("TVPA"),[193] which explicitly creates federal causes of action for extrajudicial killing and torture.[194] The legislative history to the TVPA states that the ATS "should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law."[195]

Although this history suggests that modern Congresses intended to allow some federal-common-law incorporation of CIL, the Supreme Court did not find a "congressional mandate to seek out and define new and debatable violations of the law of nations" or that modern Congresses had provided affirmative encouragement of "greater judicial creativity" in incorporating CIL.[196] Indeed, the Court noted that in spite of the encouraging statement in the TVPA's legislative history, "Congress as a body has done nothing to promote" ATS suits based on CIL norms beyond the prohibitions on torture and extrajudicial killings.[197] Moreover, the Senate has several times "expressly declined to give the federal courts the task of interpreting and

187 *See Sosa*, 542 U.S. at 731.

188 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

189 *Sosa*, 542 U.S. at 724–25; *see supra* note 7.

190 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).

191 *Id.* at 810–11 (Bork, J., concurring); *see Sosa*, 542 U.S. at 731. *But cf. Tel-Oren*, 726 F.2d at 811, 813–16 & n.22 (Bork, J., concurring) (suggesting that Congress, in enacting the ATS, may have recognized that the three paradigm offenses discussed in *Sosa* carried "with them a private cause of action for which" the ATS provided federal jurisdiction).

192 *Sosa*, 542 U.S. at 731.

193 Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2000)).

194 *Sosa*, 542 U.S. at 728.

195 H.R. REP. NO. 102-367, at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86.

196 *Sosa*, 542 U.S. at 728.

197 *Id.*

applying international human rights law," as when it ratified the ICCPR subject to a declaration "that the substantive provisions of the document were not self-executing."[198]

The Court welcomed further guidance from Congress, recognizing that Congress could entirely prohibit federal courts from incorporating CIL as federal common law "(explicitly or implicitly by treaties or statutes that occupy the field) just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such."[199] However, the Court had to decide *Sosa* based on the evidence of congressional intent before it. Given the available evidence of the First and modern Congresses' intent, the Court held that federal courts could continue to recognize limited CIL-based causes of action that coincide with the ATS's jurisdictional grant.[200]

The broader and more critical point, however, is that the Court required a finding of congressional intent before permitting the common-law incorporation of CIL. *Sosa* thus stands for the proposition that, as a rule, congressional intent is the threshold for federal judicial authority to apply CIL as federal law,[201] just as the intent of the politi-

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198 *Id.*; *see also id.* at 747 (Scalia, J., concurring in part).

199 *Id.* at 731 (majority opinion).

200 *See id.* at 712 (finding, based on the First Congress's "limited, implicit sanction" of federal courts' authority "to entertain the handful of international law *cum* common law claims understood in 1789," no authority to recognize broader common-law causes of action exists today); *id.* at 724–28; *cf.* Charles W. Brower II, *Calling All NGOs: A Discussion of the Continuing Vitality of the Alien Tort Statute as a Tool in the Fight for International Human Rights in the Wake of* Sosa v. Alvarez-Machain, 26 WHITTIER L. REV. 929, 941–42, 944, 946–48 (2005) (acknowledging that the *Sosa* Court found congressional authorization to recognize CIL-based causes of action, while arguing that Congress's authorization was broader than what the Court actually found).

As the *Sosa* opinion illustrates, "[i]t may not always be easy to determine whether the political branches have authorized the development of a federal common law rule concerning CIL." Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note 4, at 869. Congress, of course, may provide clarity by expressly enacting causes of action based on CIL, as it did in the TVPA, rather than merely delegating authority to do so. *See* Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1, 33–34 (2004) (arguing that Congress's creation of a private right of action for victims of human trafficking eliminates concerns raised by *Sosa*); *supra* note 193 and accompanying text.

201 Even scholars who would continue to assert that "[r]ecognition and enforcement of international law as a matter of federal common law without specific legislative authorization does not overstep the proper judicial role" should acknowledge that "the existence of the ATS and the history of congressional activity and inactivity in relation to the growth of ATS litigation provided at least some legislative countenance to the federal common law role" approved in *Sosa* and limit *Sosa*'s value as an endorsement of federal authority to create CIL-based common law in the absence of congressional authorization. Neuman, *supra* note 26, at 129; *see also id.* at 132–33, 135, 152; Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1205–07

cal branches is the touchstone of judicial authority to apply a treaty as federal law. Moreover, as with self-execution, considerations besides evidence directly probative of congressional intent bear on the courts' authority to incorporate CIL. The Court in *Sosa* identified several such factors.

### *B. Specific Definition and Mutuality*

In obvious parallel to self-execution analysis, the first two factors the Court identified were specific definition and mutuality.[202] The Court held that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content[, i.e., specific definition,] and acceptance among civilized nations[, i.e., mutuality,] than the historical paradigms familiar when [the ATS] was enacted."[203] These specificity and mutuality requirements proved fatal to Alvarez's ATS claim.[204] Alvarez, according to the Court,[205] relied on "a general prohibition of 'arbitrary' detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances."[206] Alvarez could only demonstrate, however, acceptance of "a norm against arbitrary detention . . . at a high level of generality."[207] To the extent the Restatement provided support for a more specific rule—a rule against state-sanctioned "'prolonged arbitrary detention'"—even that rule would not sufficiently specify when a policy of prolonged arbitrary detention

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(2005) (arguing that *Sosa* definitively endorses federal courts' authority to incorporate CIL as federal common law, while acknowledging that *Sosa* "carefully moors the elaboration of the federal common law in the authorization of the [ATS]"); Steinhardt, *supra* note 1, at 2253–55, 2259, 2272–74 (arguing that Congress authorized creation of CIL-based common law pursuant to the ATS, even while asserting that *Sosa* rejected the minority view that CIL was not federal common law); Stephens, *Human Rights Litigation*, *supra* note 26, at 548–50 (same). This Part has demonstrated that the *Sosa* Court's focus on legislative intent was far more than empirical happenstance, however. Congressional intent was central to the Court's assessment of the propriety of common-law incorporation.

202 Although these are separate factors, the Court treated them as interlocking requirements, *see Sosa*, 542 U.S. at 725, and they raise common concerns that may be addressed together. Accordingly, I discuss them together in this Part.

203 *Id.* at 732; *see id.* at 724; *cf.* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 805–08 (D.C. Cir. 1984) (Bork, J., concurring) (arguing that the fact that the international law norms on which plaintiffs relied were "anything but clearly defined" or well accepted counseled against recognition of a cause of action).

204 *See Sosa*, 542 U.S. at 725.

205 Commentators have argued that the Court's characterization of Alvarez's claim was miserly at best. *See* Steinhardt, *supra* note 1, at 2253, 2281–82.

206 *Sosa*, 542 U.S. at 736.

207 *Id.* at 736 n.27.

would render its enforcers "enemies of the human race" and would certainly require something more than Alvarez's "relatively brief detention in excess of positive authority."[208] Thus, "the broad [norm of CIL] Alvarez advance[d]" was at present "an aspiration" lacking the required specificity.[209] Absent specificity and mutuality, the federal courts could not provide a common-law remedy; as with treaties, specific definition and mutuality considerations served to cabin federal courts' authority to apply CIL as a federal rule of decision.

One might argue that the specific definition and mutuality limitations on the federal application of CIL (a) are born of the historical context in which the ATS was enacted and (b) only apply to ATS claims.[210] There is some basis for the former contention, as the specificity and mutuality limitations certainly emanate from congressional intent with regard to the ATS. The paradigm offenses, according to the Court, were accepted as part of the law of nations at the time the ATS was enacted and were likely the offenses the ATS-drafters had in mind when providing jurisdiction for torts in violation of the law of nations.[211] The First Congress only intended to provide federal jurisdiction to hear these three claims, or at least a narrow set of such claims.[212] Modern Congresses have approved of federal courts' recognition of other causes of action, but that recognition has been subject to limiting standards like those the *Sosa* Court adopted.[213] Thus, one might conclude that the specificity and mutuality standards that *Sosa* imposed, as informed by the paradigm offenses, were simply mandated by congressional intent. To the extent that is true, the Court's adoption of these standards is a further manifestation of the principle that congressional intent is the touchstone of CIL incorporation.

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208 *Id.* at 737 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987)).

209 *Id.* at 738.

210 *See* Steinhardt, *supra* note 1, at 2250 (arguing that the three paradigm offenses "clearly inform[ ] the rule of evidence that should govern future ATS proceedings").

211 *Sosa*, 542 U.S. at 715.

212 *Id.* at 720.

213 *Id.* at 730–33; *see id.* at 747–51 (Scalia, J., concurring in part) (criticizing the Court for using the same standards that "ambitious lower courts have used"); Brower, *supra* note 200, at 939 ("The rule stated in *Sosa* is essentially no different than the rule stated in *Filartiga* over twenty years prior."); Dodge, *supra* note 26, at 87, 94 ("[T]he restraint imposed by the *Sosa* Court[ ] was no more than the lower courts had already been exercising in cases under the ATS."); Steinhardt, *supra* note 1, at 2245, 2250–51 (asserting that the limitations imposed by the *Sosa* Court were consistent with those employed by lower courts); Stephens, *Human Rights Litigation*, *supra* note 26, at 534–35, 551–55 (remarking that the tone and standard adopted by *Sosa* mirror the approach of *Filartiga* and most of its progeny); *cf.* Brav, *supra* note 26, at 266, 272 (arguing that *Sosa* endorsed "a slightly more restricted version of *Filartiga*").

However, congressional intent is only part of the story behind the Supreme Court's imposition of the specific definition and mutuality considerations. Indeed, had the Court felt obliged to impose limitations solely to respect the intent of (at least the First) Congress, it presumably would have permitted recognition only of causes of action in situations where a failure to do so would strain U.S. relations with other countries (again with the three specified offenses as paradigms),[214] for it was the national government's inability to respond to international law violations damaging foreign relations that motivated enactment of the ATS.[215] But the specificity and mutuality standards arguably do not derive solely from the ATS. They are part of a broader analysis that applies to the incorporation question generally, as is evidenced by the fact that these standards (a) are inspired by separation of powers concerns independent from the ATS and (b) serve to address those concerns whenever common-law incorporation is at issue.

The specificity and mutuality considerations arose from the *Sosa* Court's fidelity to the post-*Erie* distribution of lawmaking authority between Congress and the federal courts.[216] Indeed, the Court decided against Alvarez precisely because "[c]reating a private cause of action to further [the broad norm Alvarez advanced] would go beyond any residual common law discretion [the Court thought] appropriate to exercise."[217] As the Court explained, *Erie* concerns provide "good reasons" for restraining "the discretion a federal

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214 *See* Ku & Yoo, *supra* note 2, at 178–79 (commenting that "[w]hile [the *Sosa* Court] looked to the diplomatic problem that had beset the national government under the Articles of Confederation, it rejected the idea that the ATS should be so limited" and, indeed, transformed the purpose of the ATS "from keeping the United States out of diplomatic incidents to keeping other nations to their international obligations"). *But cf.* Memorandum for the United States as Amicus Curiae at 22, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090) (arguing that when "there is a consensus in the international community that [a] right is protected and that there is a widely shared understanding of the scope of this protection[,] . . . there is little danger that judicial enforcement will impair our foreign policy efforts").

215 *See Sosa*, 542 U.S. at 716–18; Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812, 815–16 (D.C. Cir. 1984) (Bork, J., concurring).

216 *See Sosa*, 542 U.S. at 725–28. While the *Sosa* Court focused on the proper distribution of federal lawmaking authority, the specificity and mutuality concerns also serve to police the distribution of foreign affairs authority among the federal branches. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) ("[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since courts can then focus on the application of an agreed principle . . . rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.").

217 *Sosa*, 542 U.S. at 738; *see also id.* at 738 n.29 (asserting that lack of specificity is a clear "point against the creation by judges of a private cause of action to enforce the aspiration behind

court . . . exercise[s] in considering a new cause of action" based on CIL.[218] Those concerns, which arise whenever CIL is incorporated as federal common law, are mitigated by the specific definition and mutuality requirements.[219]

At a basic level, specific definition and mutuality serve to ensure that federal courts do not incorporate norms that have not yet qualified as CIL.[220] But these requirements do more than that; they also serve to limit the discretion courts may exercise even when the traditional definition of CIL is arguably satisfied.[221] CIL results from the "general and consistent practice of states followed by them from a sense of legal obligation."[222] The inherent difficulty of identifying norms that satisfy this definition leaves room for significant discretion in recognizing claims based on CIL.[223] Requiring widespread accept-

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the rule claimed"); *id.* at 733 n.21 (noting that the specific-definition requirement was dispositive of Alvarez's claim).

218 *Id.* at 725.

219 *See id.* at 726.

220 *See id.* at 738 n.29 (finding that lack of specificity "is evidence against [a norm's] status as binding law"); Neuman, *supra* note 26, at 131 (positing that the limitations imposed by *Sosa*, including the specificity requirement, suggest that "federal courts should be followers, not leaders, in the development of [CIL]"); Steinhardt, *supra* note 1, at 2267 ("[T]he 'specific, universal, and obligatory' standard enables courts to distinguish genuinely customary norms from merely idiosyncratic or aspirational norms.").

221 *See Sosa*, 542 U.S. at 738 n.29; Grace C. Spencer, Comment, *Her Body Is a Battlefield: The Applicability of the Alien Tort Statute to Corporate Human Rights Abuses in Juarez, Mexico*, 40 GONZ. L. REV. 503, 530 (2005) (noting that the restrictions *Sosa* placed on CIL claims "are far narrower than the modern understanding of customary international law").

222 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

223 *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (recognizing the "awesome duty" placed on federal courts attempting "to derive from an amorphous entity—*i.e.*, the 'law of nations'—standards of liability applicable in concrete situations"); Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note 4, at 854–55 (rejecting the notion "that judges 'find' rather than 'make' CIL," given "CIL's 'soft, indeterminate character'" (quoting LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 29 (1995))); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 451, 459 (2000) (arguing, *inter alia*, that CIL is "a matter of taste," a servant of "many masters because its elements, state practice and *opinio juris*, have no ascertainable meaning and are routinely ignored"); Ku & Yoo, *supra* note 2, at 184–86 (detailing numerous difficulties in identifying CIL); Steinhardt, *supra* note 1, at 2245, 2251 (describing the process by which courts identify CIL as "irreducibly impressionistic" and "inherently discretionary"); Swaine, *supra* note 26, at 1526–28 & n.134 ("Those assigned to construe [CIL] have so many sources from which to draw, and so few constraints, that the task of discovery and application is hard to distinguish from lawmaking."); Young, *supra* note 1, at 385–91, 396–98 (discussing concerns with CIL that undercut the notion that judges merely discern established CIL norms). *But cf.* Chander, *supra* note 201, at 1209 (arguing that the judiciary is the branch of government best suited to "review the difficult plethora of legal materials that constitute international law"); Koh, *supra* note 4, at 1853 (arguing that when federal courts make common law based on CIL, they "exercise *less*

ance of specifically defined norms reduces the scope of that discretion.[224] Specific definition helps to ensure that the norms courts incorporate provide judicially enforceable standards rather than allow courts to fill abstract principles with their own content.

Similarly, mutuality ensures that courts do not take the lead in enforcing norms that as yet remain underrecognized by other states. Certainly there are times when the United States should endorse as CIL and adopt as domestic law standards that have not yet achieved extensive acceptance internationally. But the decision to bind the United States without mutuality of commitment from other states is a judgment best left to the political branches.[225] As with treaties, it is less controversial for a court to bind the United States to international norms that have been mutually recognized as obligatory by a large number of other states.[226]

In short, the specificity and mutuality considerations the Supreme Court adopted are not exclusive to ATS litigation. Although they are critical to ATS litigation and were key to resolving Alvarez's ATS claim, the reason the Court imposed them and their general utility suggest that they are intended to guide incorporation of CIL by federal courts whether pursuant to the ATS or otherwise.

The specificity and mutuality considerations imposed on CIL incorporation obviously mirror the considerations involved in self-execution analysis. Moreover, as in self-execution analysis, specificity and mutuality are not the only considerations the Court adopted to guide incorporation of CIL. Because specificity and mutuality con-

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judicial discretion than when making other kinds of federal common law, as their task is not to create rules willy-nilly, but rather to discern rules of decision from an existing corpus of [CIL] rules").

224 These requirements would, as one example, prevent courts from applying a norm of CIL to an innovative defendant without assurance that such application had become well-accepted in CIL. *See Sosa*, 542 U.S. at 732–33 & n.20.

225 *Cf.* Note, *supra* note 26, at 2391–92, 2395–98 (arguing that Congress, under the Offences Clause, possesses legislative authority to incorporate norms of CIL that fall short of the specificity and mutuality required for common-law incorporation).

226 *Cf.* Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980) ("It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the [ATS].").

This is not to suggest that courts may incorporate all CIL norms that have reached a certain level of specificity and acceptance. Courts' authority to incorporate still depends on congressional intent and the other considerations detailed in this Part. But in cases where congressional intent is present and other considerations do not militate against incorporation, incorporation will raise fewer separation of powers concerns where the norm incorporated is both specifically defined and mutually accepted by a large number of states.

cerns were sufficient to dispose of Alvarez's claim, the *Sosa* Court did not discuss these other considerations in great detail, but did identify them and gave some sense of their content.[227]

### C. *Practical Consequences*

The Court held that in deciding whether it is appropriate to incorporate CIL as federal common law—as in deciding whether to apply a treaty as self-executing—federal courts must consider the practical consequences of doing so.[228] Indeed, the *Sosa* Court noted that consideration of practical consequences is inevitable in analyzing specificity.[229] The Court concluded that Alvarez's alleged norm was insufficiently specific in part because "its implications would be breathtaking."[230] If the Court recognized, as Alvarez urged, a cause of action for "officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances" attending the detention, that cause of action would encompass "any arrest, anywhere in the world" that was "unauthorized by the law of the jurisdiction in which it took place."[231] "It would create an action in federal courts for arrests by state officers who simply exceed their authority"—"the reckless policeman who botches his warrant."[232] It would create a claim "for the violation of any limit that the law of any country might place on the authority of its own officers to arrest."[233] And if the cause of action were interpreted to cover detentions by nongovernmental actors, the consequences would be even more far-reaching. The expansive consequences of incorporating Alvarez's alleged norm of CIL persuaded the Court that such lawmaking by the federal judiciary would be improper. While the Court in *Sosa* analyzed these practical consequences as a subset of the specific-definition requirement, practical consequences bear independent weight in the incorporation analysis,

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227 *See Sosa*, 542 U.S. at 733 n.21 (noting that the "requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of [CIL], though it disposes of this action").

228 *See id.* at 727–28, 732–33 (expressing concern for "the possible collateral consequences" of applying CIL in federal courts without express authorization); *id.* at 746 (Scalia, J., concurring in part); *cf. Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring) (rejecting as "too sweeping" an interpretation of the ATS that "would authorize tort suits for the vindication of any international legal right").

229 *Sosa*, 542 U.S. at 732–33.

230 *Id.* at 736.

231 *Id.*

232 *Id.* at 737.

233 *Id.*

as even a specifically defined norm might produce consequences that would counsel against incorporation absent clearer congressional intent.

### *D. Foreign Relations Effects*

As in self-execution analysis, one practical consequence plays a particular role in CIL incorporation analysis: the *Sosa* Court emphasized that "the potential implications for the foreign relations of the United States of recognizing [private claims for violations of CIL] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[234] As this statement intimates, CIL incorporation might negatively impact U.S. relations with other states, the political branches' range of discretion to conduct foreign affairs, and the distribution of foreign affairs authority between the political branches and the judiciary. Courts must weigh these concerns in deciding whether to incorporate norms of CIL, just as courts weigh these concerns in conducting self-execution analysis.

Consistent with this principle, the *Sosa* Court took specific note of the foreign relations impact of incorporating CIL in ATS suits, which involve federal courts in identifying "limits on the power of foreign governments over their own citizens," and in holding "that a foreign government or its agent has transgressed those limits."[235] Notwithstanding the potential good done by these suits, they "raise risks of adverse foreign policy consequences."[236] As a result, federal courts should undertake these suits, "if at all, with great caution" and sensitivity to their foreign relations impact.[237]

The *Sosa* Court also indicated that federal courts might need to defer to the political branches' foreign affairs assessment in appropriate cases.[238] For example, the U.S. executive agreed with the government of South Africa that ATS class action suits brought in the United States against corporations allegedly complicit in apartheid interfere with the response to apartheid that South Africa has chosen: an approach emphasizing confession and forgiveness rather than judicial

234 *Id.* at 727; *see also id.* at 747 (Scalia, J., concurring in part); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 804–06 & n.12 (Bork, J., concurring) (arguing that potential negative impact on foreign affairs counseled against both judicial recognition of a private cause of action and the existence of a private cause of action under international law).

235 *Sosa*, 542 U.S. at 727; *see also id.* at 746–47 (Scalia, J., concurring in part).

236 *Id.* at 728 (majority opinion).

237 *Id.*

238 *Id.* at 733 n.21.

penalties.[239] "In such cases," the Court explained, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."[240]

While the Court suggested that this deference was a separate consideration, it appears simply to be a manifestation of the foreign relations concerns, noted above, that figure into incorporation analysis. To preserve the political branches' authority to conduct foreign affairs as they see fit, and because the political branches are often more competent at assessing foreign relations' impact, courts sometimes must defer to the political branches' foreign relations calculations:[241] in the South African context, the executive's assessment of the impact the litigation would have on U.S.–South Africa relations and the executive's conclusion that such an impact would not be in our interest.[242]

### *E. Alternative Enforcement Mechanisms*

In addition to identifying foreign relations considerations as part of the incorporation analysis, the *Sosa* Court concluded that federal courts might restrict incorporation in cases where international law requires exhaustion of remedies in local and perhaps international tribunals before a plaintiff raises "a claim in a foreign forum."[243] On one level, respect for an international exhaustion requirement might be a manifestation of the specific-definition requirement. That is, courts should only recognize claims that are sufficiently specific and then should only recognize them as specified. If a claim is subject to an exhaustion requirement in international law, it should not be incorporated without that limitation. On another level, the Court's solicitude toward an international exhaustion requirement manifests an independent consideration in the incorporation analysis: the availability of alternative means of enforcement. If CIL claims are capable of

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239 *Id.*

240 *Id.*

241 *But cf.* Stephens, *Human Rights Litigation*, *supra* note 26, at 561–67 (suggesting that courts must not simply defer to the executive's foreign affairs assessment when it is counterfactual, and asserting that "the *Sosa* opinion makes no mention at all of the executive branch's views of the case or of its overwrought description of the supposed danger that ATS cases pose to U.S. foreign policy").

242 Following *Sosa*, the district court dismissed for lack of jurisdiction the ATS claims raised in the apartheid litigation, relying in part on the U.S. government's representation "that the adjudication of this suit would cause tension between the United States and South Africa and would serve to hamper the policy of encouraging positive change in developing countries via economic investment." *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 553 (S.D.N.Y. 2004); *see also id.* at 554.

243 *Sosa*, 542 U.S. at 733 n.21.

enforcement in another forum, the federal judiciary would be less justified in incorporating them for enforcement in federal courts, just as federal courts would be less justified in applying a treaty as self-executing if the treaty contemplated enforcement through alternative means.

### *IV. Uniformity and Its Implications*

As the above discussion acknowledges, the Supreme Court in *Sosa* did not explicitly state that common-law incorporation of CIL is governed by the same standards as self-execution of treaties. Indeed, the Court's somewhat scattered identification of the considerations that constrain judicial incorporation of CIL suggests that the Court may not have been aware that it was prescribing the same factors that have guided self-execution analysis. However, even a cursory comparison of the considerations involved in self-execution analysis and those imposed by *Sosa* to guide CIL incorporation reveals almost perfect correlation. In both contexts, the political branches' intent is the keystone of the analysis. Considerations of specific definition, mutuality, practical consequences, foreign relations effects, and alternative enforcement mechanisms also factor in. It appears, then, that the Court has discovered and outlined the elements of a uniform doctrine governing the status of both sources of international law in federal courts.

True, there are some differences between the analyses for treaties and CIL. For example, Congress's intent is often paramount in determining whether CIL may be incorporated as federal common law, while both Congress's and the executive branch's intent are regularly relevant in determining whether an international agreement is self-executing.[244] But this difference merely reflects the allocation of U.S. lawmaking authority with respect to the two primary sources of international law. The Constitution and historical practice assign a role to both Congress and the executive in fashioning international agreements as federal law,[245] while Congress possesses primary authority to incorporate CIL via federal statutes, either under its power to define and punish violations of the law of nations or its other legislative powers.[246] To the extent the executive acts to incorporate CIL through regulation or proclamation, the executive's intent may be relevant as

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244 *See supra* Part II.A.

245 *See* U.S. CONST. art. II, § 2, cl. 2 (granting the President, with the agreement of the Senate, the power to make treaties); CARTER, TRIMBLE & BRADLEY, *supra* note 43, at 209–10.

246 *See* U.S. CONST. art. I, §§ 1, 8.

well.[247] Consequently, the variable focus on the intent of one or both of the political branches ultimately is a distinction without a difference.

At heart, the analysis for both treaties and CIL serves the same purpose: to safeguard the authority of the political branches who are charged with primary responsibility for enacting federal law and conducting foreign affairs.[248] Thus, whether the considerations beyond intent are perceived as evidence of, or presumptions regarding, Congress's intent, or simply as analytical safeguards to prevent federal courts from overstepping their authority, the factors at bottom seek to police the proper distribution of power between the federal judiciary and the relevant political branches.[249]

Because the motive behind the analysis for both treaties and CIL includes preservation of a proper separation of powers, it is not surprising that the Court turned to the same considerations in both contexts, even if unknowingly.[250] Indeed, perhaps what is more surprising

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247 *See* Bradley, Goldsmith & Moore, *supra* note 27.

248 *See Sosa*, 542 U.S. at 724–33; Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) (stating that the conduct of U.S. foreign affairs is constitutionally assigned to the political branches); Iwasawa, *supra* note 85, at 672 (noting the separation of powers function of a specific definition requirement); Vázquez, *supra* note 12, at 695–96, 712–15, 717 & n.102, 722–23 (noting the "domestic allocation-of-powers function" of the self-execution doctrine generally, and of specific considerations in the self-execution analysis).

249 *Cf.* Steven M. Schneebaum, *The Paquete Habana Sails On: International Law in U.S. Courts After* Sosa, 19 EMORY INT'L L. REV. 81, 101–02 (2005) (noting the separation of powers function of considerations the *Sosa* Court adopted). Thus, the Court's concern for both congressional intent and the additional considerations is not merely a schizophrenic attempt to bridge past and present, to "give effect . . . to the expectations of the First Congress while also taking seriously more modern concerns" of the U.S. legal system, as has been asserted. Dodge, *supra* note 26, at 99; *see id.* at 88–89, 97–100. Nor are the additional factors inconsistent with the concern for intent, as has likewise been suggested. *See* Vázquez, *supra* note 12, at 711, 715–16 (decrying courts' consideration of factors beyond intent in analyzing self-execution). Instead, consideration of the political branches' intent and the other factors identified yields a more comprehensive approach for policing the proper separation of powers between the political branches and the judiciary.

Whether considerations beyond intent might be better assessed under a separate doctrinal banner is beyond the scope of this Article. For one commentator's views on this issue, see *id.* at 711–14, 722–23; Vázquez, *supra* note 35, at 1119–22.

250 These considerations, of course, can lead to different conclusions, depending on one's conception of the appropriate separation of powers. In *Sosa*, for example, while considerations such as the intent of modern Congresses and the potential foreign affairs effect of recognizing a private cause of action led the majority to find limited authority to create common-law claims based on CIL, these same considerations convinced Chief Justice Rehnquist and Justices Scalia and Thomas that federal courts lacked that authority altogether. *Compare Sosa*, 542 U.S. at 724, 728–31, *with id.* at 746–47 (Scalia, J., concurring in part). In Justice Scalia's view, the majority's position was inconsistent with the method "[w]e Americans have . . . for making the laws that are over us." *Id.* at 750.

is that the Court did not explicitly acknowledge the parity of concerns that underlie judicial application of treaties and CIL and expressly adopt the same analysis for both. What the Court failed to do in terms, however, it did in practice, laying the groundwork for recognition of a uniform doctrine for both treaties and CIL.

The implications of this emerging uniformity are significant. At a basic level, uniformity promises to simplify the status of international law in federal courts. As noted, international law's status in federal courts has been the subject of much debate and confusion. *Sosa* suggests that we may be on the eve of greater clarity and simplicity. Soon, it seems, we might speak in terms of the federal status of international law generally, rather than the separate statuses of treaties and CIL, and have resort to a uniform doctrine to guide our discussion. This is not to say that the doctrine is fully developed.[251] To the contrary, many questions remain,[252] but the basic contours of this unifying doctrine have emerged in *Sosa*.

Perhaps equally important, the emerging uniformity suggests that academic commentary on the domestic status of international law is significantly out of step with Supreme Court jurisprudence. As noted above, academic commentators have questioned the self-execution doctrine and criticized the political branches' use of non-self-executing declarations.[253] Nonetheless, the Court in *Sosa* deferred to the non-self-executing declaration attached to the ICCPR, and not only affirmed the self-execution doctrine[254] but also extended its core con-

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251 Indeed, the Court in *Sosa* suggested that additional, but unidentified, factors may be relevant in evaluating claims for incorporation of CIL. *See id.* at 733 n.21 (majority opinion). The Court, however, rejected as one such factor whether international law recognizes universal jurisdiction over the CIL norm advanced. *See id.* at 761–63 (Breyer, J., concurring in part).

252 For example, the relative weights of the factors guiding the analysis requires development. Similarly, the type and amount of evidence that will establish congressional intent to authorize common-law incorporation is uncertain. The historical and contemporary context of the ATS was sufficient in *Sosa*. *See id.* at 712–24, 730–31 (majority opinion). But would, for example, congressional enactment of a private right of action for CIL violations committed in the United States provide sufficient proof of intent to authorize a common-law remedy for similar violations committed abroad? *See* Kim & Hreshchyshyn, *supra* note 200, at 34 (arguing that, post-*Sosa*, Congress's creation of a private right of action for persons trafficked to the United States might bolster the chance of a successful ATS claim by individuals trafficked outside the United States). Many such questions remain.

253 *See supra* notes 13–14 and accompanying text.

254 *See* Cohen, *supra* note 26, at 287 ("[W]ith a dash of his pen, Justice Souter seems to settle the long open question of whether the Senate can impose its own conditions in ratifying a treaty."); John T. Parry, *Progress and Justification in American Criminal Law*, 40 TULSA L. REV. 639, 646 n.25 (2005) (noting analysis in the *Sosa* opinion "that seem[s] to indicate the Supreme Court's acceptance of non-self-execution declarations"); Steinhardt, *supra* note 1, at 2283 (arguing that the Supreme Court's "decision [in *Sosa*] to ignore the provisions of the ICCPR because

siderations to CIL. In so doing, the Court emphasized Congress's primacy in CIL incorporation.[255] As noted above, the crux of the minority position regarding CIL's domestic status was that federal courts' authority to apply CIL as common law derives from the political branches. While the Supreme Court did not adopt a rule that the political branches must always confer common-law-making authority expressly,[256] the Court did endorse the minority position that federal judicial power to incorporate CIL derives from political branch authorization. Similarly, in identifying other considerations to guide the incorporation analysis, the Court necessarily rejected the majority position that all CIL qualifies as federal common law, or even that all specific and widely accepted norms of CIL qualify as federal common law.[257] The Court thus rebuffed the academic majority position on the domestic status of CIL.[258]

The Court cast doubt on scholarly international law commentary in a more fundamental sense as well. Commentators have noted the Supreme Court's inability to develop a coherent jurisprudence with regard to international law. Decades ago, Louis Henkin stated that in the area of foreign affairs "the cases are few; the Supreme Court does not build and refine steadily case by case; it develops no expertise or experts; [and] the [J]ustices have no clear philosophies."[259] Although cases touching on international law now reach the Court with greater frequency, a view similar to Henkin's resurfaced in an assessment of the Supreme Court Term in which *Sosa* was decided. John Setear asserts that the Supreme Court avoided recourse to international law in the 2003 Term out of a discomfort with international law that arises in part from the fact that "[t]he Court does not routinely wrestle with

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it is understood to be non-self-executing is a careless expansion of a dubious doctrine"). *But cf.* Halberstam, *supra* note 13, at 91–92, 95–107, 110–11 (challenging the constitutionality of attaching non-self-execution declarations to otherwise self-executing treaties and arguing that *Sosa*'s uncritical acceptance of this practice "should not be considered dispositive").

255 For one commentator's defense of congressional primacy in incorporating CIL, see Mark K. Moller, *Old Puzzles, Puzzling Answers: The Alien Tort Statute and Federal Common Law in* Sosa v. Alvarez-Machain, 2004 CATO SUP. CT. REV. 209, 222–31.

256 *Sosa*, 542 U.S. at 714 (rejecting, based on "history and practice," Sosa's argument that "there could be no claim for relief without a further statute expressly authorizing adoption of causes of action").

257 *See* Young, *supra* note 1, at 457 ("[T]o the extent that post-*Filartiga* courts have applied only a selective subset of customary international norms, those decisions do not support the categorical position that *all* customary norms are federal law.").

258 As previously noted, the *Sosa* Court's rejection of the modern position is more fully discussed in Bradley, Goldsmith & Moore, *supra* note 27.

259 Louis Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 COLUM. L. REV. 805, 831 (1964).

international legal issues."[260] This Article suggests that skepticism about the Court's ability to develop a coherent approach to international law might begin to dissipate, at least with regard to the federal status of international law. The Court has laid the groundwork for a coherent doctrine governing the status of treaties and CIL in federal courts, and the perceived avoidance of international law in *Sosa* results not from discomfort, but from adoption of that doctrine—a doctrine that restrains judicial incorporation as a result of separation of powers concerns.

That doctrine not only creates a uniform analysis for treaties and CIL, it coheres with other domestic tenets concerning international law. In U.S. law, both treaties and CIL norms are subject to constitutional restraints.[261] For example, a U.S. court would not apply a treaty provision that was inconsistent with the speech protections of the First Amendment.[262] The doctrine emerging from *Sosa* emphasizes that not only do the individual rights guarantees of the Constitution limit federal court application of international law, but the structural provisions of the Constitution do as well.[263] The federal courts' competence to apply treaties and CIL is limited by the constitutional separation of powers, which vests the political branches with primary authority to conduct foreign affairs and to fashion domestic law through statutes and treaties. That separation of powers is most forcefully protected by the prominence of the political branches' intent in the emerging analysis. The prominence of the political branches' intent in turn comports with the notion that Congress and the executive can, under

260 John K. Setear, *A Forest with No Trees: The Supreme Court and International Law in the 2003 Term*, 91 VA. L. REV. 579, 669 (2005).

261 *See* United States v. Postal, 589 F.2d 862, 877 (5th Cir. 1979) (citing RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 141(3) (1965)); Reid v. Covert, 354 U.S. 1, 16–18 (1957) (Black, J., plurality opinion) ("[T]reaties and laws enacted pursuant to them . . . have to comply with the provisions of the Constitution."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(3) (1987).

262 *See* Vázquez, *supra* note 12, at 718.

263 *See id.* at 695–96, 712–15, 722–23 (noting the separation of powers function served by various iterations of the self-execution doctrine); Yoo, *supra* note 13, at 1961–62, 1966 & n.50 (likewise recognizing the separation of powers benefits secured by the self-execution doctrine).

domestic law, violate CIL,[264] and Congress can enact legislation that trumps a prior treaty.[265]

Not only does the doctrine emerging from *Sosa* cohere with international law's domestic status more generally, it leads to more appropriate treatment of CIL and treaties in federal courts. The majority view that CIL was federal common law applicable by federal courts without congressional authorization led to the strange suggestion that treaties—which are written, negotiated, and approved by the political branches, and specifically mentioned in the Constitution as the supreme law of the land—could only be applied by federal courts if they were self-executing, while norms of CIL—which are unwritten, amorphous, not specifically referenced in the Supremacy Clause, and only indirectly controlled by the political branches—were automatically applicable as federal common law.[266] Subjecting CIL norms to the same analysis as treaties not only puts the two sources on the same footing doctrinally, but likely means that treaties will qualify for application in federal courts more easily than their more nebulous counterpart, CIL. Whereas evidence of congressional authorization to incorporate CIL norms must be sought outside these norms, treaties provide their own evidence of political branch intent. As a result, treaties may be more susceptible to application by federal courts than norms of CIL under the uniform doctrine.

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264 *See* Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 938–40 (D.C. Cir. 1988) (recognizing that Congress can enact laws inconsistent with principles of CIL); Garcia-Mir v. Meese, 788 F.2d 1446, 1453–55 (11th Cir.) (holding that Congress and at least high-level executive officials may act contrary to CIL), *cert. denied*, 479 U.S. 889 (1986); United States v. Georgescu, 723 F. Supp. 912, 921 (E.D.N.Y. 1989) (recognizing that Congress can enact laws inconsistent with principles of CIL); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) & cmt. a, reporters' note 3 (1987) (noting Congress's authority to enact laws that conflict with international law, and acknowledging authority suggesting that the President may also exercise his constitutional authority in disregard of international law).

265 *See, e.g.*, *Reid*, 354 U.S. at 18 (noting that the Supreme Court has repeatedly recognized the last-in-time rule); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) & cmt. a, reporters' note 1 (1987) (setting forth the last-in-time rule); Vázquez, *supra* note 12, at 696 (noting that, as a result of the last-in-time rule, "the legislature ultimately has the power to control the judiciary's role in enforcing even self-executing treaties"). The President may also be able to disregard a treaty "when acting within his constitutional authority." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 reporters' note 3 (1987).

266 Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note 4, at 858–59; *cf.* Moller, *supra* note 255, at 224 ("It would make little sense for the Constitution to require agreement between political branches—the executive and Senate—to ratify treaties, but to permit the judiciary carte blanche to incorporate the customary law of nations domestically, without any assent from either political branch.").

One final implication of the doctrine arising from *Sosa* may not seem as welcome. The doctrine might be perceived as hampering efforts to incorporate and enforce international law domestically.[267] The doctrine is certainly a step (or more) away from the majority position that CIL is immediately applicable in federal courts as common law.[268] The practical-consequences consideration alone suggests that international law may be least available through federal courts where advocates feel it is most needed: that is, where it would change U.S. practice. However, the perception that the doctrine undercuts international law enforcement largely results, it seems, from a reflexive and narrow focus on the courts to accomplish legal goals. *Sosa* suggests the need for a broader approach. In addition to pressing claims appropriate for judicial incorporation, international law advocates need to turn to Congress and treaty negotiators in the executive branch to translate treaties and custom into domestic law. The effort to do so may yield significant gains as incorporation through the polit-

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267 Some have perceived *Sosa* as a setback for human rights litigation in the United States, although the overall evaluation has been mixed. *See, e.g.*, Berkowitz, *supra* note 26, at 290 (arguing that "[t]he *Sosa* decision was a victory for human rights advocates because it affirmed a private enforcement mechanism to encourage foreign parties to observe human rights overseas and upheld the existence of a forum for victims to confront their abusers," though *Sosa* failed to provide a sufficiently detailed and administrable standard for identifying common-law CIL norms); Brower, *supra* note 200, at 940 (predicting that the limits the Supreme Court imposed on judicial discretion to recognize new causes of action will make it harder to succeed in ATS litigation); Cohen, *supra* note 26, at 288, 321 ("Although Alvarez lost, the zigzagging opinion was largely seen as a victory for ATS proponents and the international human rights community."); Donald J. Kochan, *No Longer Little Known but Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 103, 104 (2005) (noting mixed evaluations of *Sosa*); Ochoa, *supra* note 26, at 640 (pointing out that *Sosa* "limited the scope of viable ATCA claims," but preserved "a limited set of claims" that aliens may bring); Schneebaum, *supra* note 249, at 82–83 (rejecting "the received wisdom" that *Sosa* "erects an impediment to activists' continuing use of international human rights law" and arguing instead that *Sosa* produced an "'internationalist' opinion" that "is likely . . . to generate more, not less, effective enforcement of human rights norms in" U.S. courts); Steinhardt, *supra* note 1, at 2246 ("[H]uman rights activists may consider [*Sosa*] a victory in the sense that escaping a fire is a victory . . . but the impact of the decision on future litigation remains a matter of reasoned speculation."); Stephens, *Corporate Liability*, *supra* note 26, at 995, 1003 (arguing that the *Sosa* decision "delighted supporters of federal court human rights litigation" because "the Court provided a cautious endorsement of the *Filártiga* doctrine"); Stephens, *Human Rights Litigation*, *supra* note 26, at 535 (noting that *Sosa* disappointed those who saw federal courts' role under the ATS as either expansive or improper, but calling it "a clear victory for those . . . who view the statute as a means to hold the most egregious perpetrators accountable for the most egregious violations of international law").

268 This does not mean that support for the doctrine translates into opposition to, or distaste for, international law. Kochan, *supra* note 267, at 109. The doctrine addresses the proper procedure for incorporating international law into domestic law, not the value of substantive international laws.

ical branches serves to distill the charge that international law, like judicial incorporation, suffers from a democratic deficit.[269] Political branch incorporation similarly preserves the protection afforded by a system of separation of powers.[270]

## *Conclusion*

After decades of debate regarding the status of international law in federal courts, a coherent resolution has begun to emerge. Though unacknowledged by the Supreme Court and, prior to this Article, by scholars, the recent opinion in *Sosa v. Alvarez-Machain* suggests that federal court application of the primary sources of international law—treaties and custom—is governed by a uniform doctrine that assimilates the considerations of self-execution. This development contradicts the preponderance of academic wisdom on the subject but yields a relatively straightforward symmetry of treatment for treaties and CIL in federal courts that does not, like the majority position before it, elevate custom over treaties, nor the courts over Congress.

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269 *See* Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note 4, at 871 ("In the long run, . . . the requirement of political branch authorization may actually enhance the enforceability of these norms. In general, CIL norms incorporated into federal statutes possess the virtues of being clearer, more concrete, and more democratic than uncodified CIL. These characteristics may alleviate concerns in this country about the legitimacy and content of these CIL norms."); *see also id.* at 857–58 (discussing the incompatibility of treating CIL as federal common law with "American representative democracy"); Kochan, *supra* note 267, at 107 (noting the democratic deficit in deriving CIL-based common law from nonbinding resolutions and international instruments the political branches rejected); Young, *supra* note 1, at 398–400 (discussing the argument that incorporation of CIL as federal common law is undemocratic due to both the discretion involved and the foreign source of CIL); Brav, *supra* note 26, at 276 (noting arguments and counter-arguments regarding the democratic deficit in judicial incorporation of CIL). *But see* Chander, *supra* note 201, at 1203 (invoking the thinking of John Hart Ely to argue that the fluid transnational legal process undergirding international law is "a possible buttress [rather than a rival] to democracy").

270 *See* David H. Moore, *Setting the Record Straight:* Sosa v. Alvarez-Machain *and the Debate over Customary International Law*, *in* THE OUTSOURCING OF AMERICAN LAW (forthcoming 2007) (manuscript at 18–19, on file with The George Washington Law Review).